Petition

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No. 81-
~~81-1374~~

IN THE

Supreme Court of the United States

October Term, 1981

BARBARA BLUM, individually and in her capacity as Commissioner of the New York State Department of Social Services,

Petitioner,

against

ELLEN STENSON, individually and on behalf of all other persons similarly situated,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Whether 42 U.S.C. § 1988 authorizes a "bonus" award over and above the amount of attorney's fees determined by multiplying the reasonable number of hours expended by a reasonable hourly rate, and, if so, whether the courts below abused their discretion in awarding a 50% "bonus" in this case?

2. What is the appropriate standard to be applied in determining the hourly rate to be awarded under 42 U.S.C. § 1988 to staff attorneys of publicly funded legal services offices, that do not bill their clients?

3. Where respondent's attorneys do not bill their clients for legal services performed, did the District Court err in determining an hourly rate in fashioning an attorney's fee award under 42 U.S.C. § 1988 that did not reflect the actual costs involved in the delivery of those services?

4. Did the District Court abuse its discretion in failing to require respondent's attorneys to specify how their legal services were divided to avoid duplication of effort in the determination of their attorney's fee application?

5. Whether the Court of Appeals improperly evaded its supervisory responsibility to provide needed standards in the unsettled area of statutory attorney's fee determinations when it summarily affirmed, in an unpublished opinion, an officially reported district court decision?

Parties in the Court Below

Barbara Blum, individually and in her capacity as Commissioner of the New York State Department of Social Services, was the defendant-appellant in the court below. Ellen Stenson, individually and on behalf of all other persons similarly situated, was the plaintiff-appellee in the court whose judgment is sought to be reviewed. Although the complaint in this action was also brought against Blanche Bernstein, individually and in her capacity as Commissioner of the New York City Department of Social Services and Joseph Califano, individually and as Secretary of (then) Health, Education and Welfare (hereinafter "HEW"),* neither of these defendants participated in the court below and it is petitioner's belief that neither of them has any interest in the outcome of this petition.**

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* Subsequent to the filing of the complaint, the name of the federal agency involved was changed to the Department of Health and Human Services (hereinafter "HHS") and Richard Schweiker succeeded Joseph Califano as Secretary.

** The complaint was dismissed as against defendants Bernstein and Califano and attorney's fees were not sought against them.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below

The order and opinion of the United States Court of Appeals for the Second Circuit, filed on October 19, 1981, affirming the order of the District Court with respect to an attorney's fee award is unpublished and not reported. It is reproduced in the Appendix to this petition at p. 1a.

The opinion of the District Court awarding attorney's fees, filed on April 2, 1981, is officially reported at 512 F. Supp. 680, and is reproduced herein at pp. 4a-13a.*

Prior opinions in this case, which are not sought to be reviewed by the petition, are officially reported at 476 F. Supp. 1331 (S.D.N.Y. 1979), *aff'd* 628 F. 2d 1345, *cert. denied* 449 U.S. 885 (1980).

Jurisdiction

The order and judgment of the Court of Appeals sought to be reviewed was entered and filed on October 19, 1981.

This Court has jurisdiction to review the judgment in question by writ of certiorari under 28 U.S.C. § 1254(1).

Statute Involved

The Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. 94-559 (Oct. 19, 1976), 90 Stat. 2641, amending 42 U.S.C. § 1988, states in relevant part:

> "In any action or proceeding to enforce a provision of Sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [Sections 1981, 1982, 1983, 1985 and 1988 of the U.S.C. Title 42], Title IX of Public Law 92-318 [Title IX of the Education Amendments of 1972, Sections 1681-1686 of U.S.C. Title 20], or Title VI of the Civil Rights Act of 1964 [Sections 2000d, *et seq.*, of U.S.C. Title 42], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

* Numbers followed by the letter "a" refer to pages in the Appendix to this petition.

Statement of the Case

A. Background

Respondent Stenson commenced this action against the Secretary of HEW (now HHS) (hereinafter the "federal defendant"), the Commissioner of the New York City Department of Social Services (hereinafter the "city defendant") and petitioner Blum on December 18, 1978. She contended that defendants' practice or policy of terminating Medicaid benefits upon the termination of SSI benefits,* without redetermination of Medicaid eligibility independent of SSI eligibility and/or without providing timely and adequate notice of the Medicaid termination and the opportunity for a pre-termination hearing, violated the Social Security Act and its implementing regulations, the Due Process Clauses of the Fifth and Fourteenth Amendments, and the Equal Protection Clause of the Fourteenth Amendment. The relief sought was a judgment declaring that practice or policy violative of the above statutory, regulatory, and constitutional provisions, a permanent injunction, and damages for the named plaintiff only. Jurisdiction was asserted under 28 U.S.C. §§ 1331, 1343(3), and 1361.

The defendants consented to temporary restraining orders continuing Medicaid coverage for respondent and two proposed intervenor plaintiffs. Three months after the commencement of this action, after the short set of interrogatories served by respondent had been answered by

* Respondent had originally been determined eligible for Medicaid by the Secretary of HEW under an Agreement between the Secretary and the State of New York entered into pursuant to 42 U.S.C. § 1383c. Under that agreement, all New York residents found eligible for SSI by the Secretary were automatically eligible for Medicaid. N.Y. Soc. Serv. Law, § 366(2).

petitioner and the federal and city defendants, respondent moved for class certification and a classwide preliminary injunction. The proposed intervenors moved to intervene and joined in the respondent's request for the above relief, filing a memorandum of law repetitive of the respondent's. Petitioner and the federal and city defendants cross-moved to dismiss, and in response, respondent and the proposed intervenors cross-moved for summary judgment repeating the same arguments made in their original briefs.

On September 18, 1979 the district court judge rendered an opinion dismissing plaintiff's claims as against the federal and city defendants, denying the motions to intervene two additional plaintiffs, and certifying a class defined as:

> New York State residents who received Medicaid due to their eligibility for SSI and whose Medicaid benefits have been terminated because of subsequent ineligibility for SSI without having received one or more of the following: (a) an *ex parte* determination of continued eligibility for Medicaid, independent of eligibility for SSI; (b) timely and adequate notice of such termination; (c) an opportunity for a hearing.

The district court judge determined that federal regulations required petitioner Blum to make an *ex parte* determination of continued Medicaid eligibility independent of SSI eligibility, and to provide timely and adequate notice and a hearing prior to terminating the Medicaid benefits of former SSI recipients. The decision further enjoined petitioner to restore Medicaid benefits to respondent and the members of her class, and to continue such benefits until the above three procedures were completed. *Stenson* v. *Blum*, 476 F. Supp. 1331 (S.D.N.Y. 1979).

Anticipating that the restoration requirement would benefit few class members while providing Medicaid to many persons currently ineligible to receive it,* petitioner appealed that requirement (but not the underlying decision on the merits) to the Court of Appeals. On May 13, 1980, in an unpublished decision, rendered pursuant to § 0.23 of the Rules of the Second Circuit,** the Court of Appeals affirmed the restoration requirement, rejecting petitioner's arguments that that requirement was an abuse of discretion and in violation of the Eleventh Amendment. See, *Stenson* v. *Blum*, 628 F. 2d 1345 (1980). Petitioner's petition for certiorari from the Circuit Court's determination of her appeal was denied on October 6, 1980. 449 U.S. 885 (1980).

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* According to defendant Blum's statistical summary of the result of the procedures required by the Stenson judgment, less than 1% of the plaintiff class was currently eligible for "Medicaid only" and had failed to apply for those benefits subsequent to their SSI terminations.

** § 0.23 of the Rules of the Second Circuit provides:

> "The demands of an expanding caseload require the court to be ever conscious of the need to utilize judicial time effectively. Accordingly, in those cases in which decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by a written opinion, disposition will be made in open court or by summary order.
>
> Where a decision is rendered from the bench, the court may deliver a brief oral statement, the record of which is available to counsel upon request and payment of transcription charges. Where disposition is by summary order, the court may append a brief written statement to that order. Since these statements do not constitute formal opinions of the court and are unreported and not uniformly available to all parties, they shall not be cited or otherwise used in unrelated cases before this or any other court."

B. The Attorneys' Fee Decisions Below

By notice dated November 26, 1980, respondent's counsel moved for an award of attorney's fees against petitioner pursuant to 42 U.S.C. § 1988. Respondent's three attorneys originally claimed an award of $128,988 for a total of 876¾ hours, which they subsequently modified to request $118,968 based on a claim of 769¾ hours. Ann Moynihan, who had approximately 1½ years of experience when she started on this case and 3 years experience at its completion, claimed an hourly rate of $95 for approximately 492 hours. Paula Galowitz, who had not quite 3 years of experience when she started on this case and 3½ years at the time she completed her work on the substantive issues against petitioner, claimed an hourly rate of $100 for approximately 299 hours. Arthur Fried, who had not quite 4 years of experience when he started on this case and 5 years at the time of its completion claimed an hourly rate of $105 for approximately 156 hours. Approximately 418.5 hours, more than half the total hours claimed, was spent on motions and briefs prepared jointly by two or more attorneys, with no explanation of who did what. Additionally, respondent's counsel claimed a 50% bonus over what they would have received had the award been calculated simply by multiplying the number of hours claimed by the rates requested.

On March 26, 1981, the district court, without an evidentiary hearing, rendered its decision (p. 4a) granting plaintiff's counsel the entire amount they had requested. The district court found the rates requested to be reason-

able by comparison with the rates of $60 per hour for a fourth year associate and $120 per hour for partners awarded in *Population Services International* v. *Carey*, 476 F. Supp. 4 (S.D.N.Y. 1979); and by comparison with rate of $150-$175 per hour awarded to experienced antitrust attorneys in *City of New York* v. *Darling-Delaware*, 440 F. Supp. 1132 (S.D.N.Y. 1977) (p. 8a).

The district court also refused to eliminate any of the hours claimed. District Judge Sweet, *inter alia*, rejected petitioner's contention that respondent's counsels' efforts were duplicative because he was "satisfied" that the work performed "was divided in such a way as to avoid duplication" (p. 11a), although such division of labor was nowhere indicated in the time records submitted; and he determined that the hours claimed were not excessive because he felt that the issues presented were "complex", although no factual support for that conclusion was given. Finally, the district court granted respondent's counsels' request for an additional 50% "bonus" or "incentive" award, because "on the facts of this case" (none of which were set forth in the decision) the district judge felt that the quality of representation was high, the litigation complex, the issues presented novel and therefore the undertaking risky, and the outcome "of great benefit to a large class of needy people" (p. 12a).

The judgment directing petitioner to pay $118,968, plus interest, to respondent's counsel was filed on April 13, 1981. Petitioner filed a notice of appeal on May 11, 1981, and specifically urged the Court of Appeals to set concrete standards for the award of attorney's fees.

On October 19, 1981, the Second Circuit Court of Appeals, in a summary unpublished opinion again rendered pursuant to § 0.23 of the Rules of the Second Circuit (p. 1a) affirmed the district court's award of attorney's fees in full. Although the time records submitted contained no indication of the division of labor between respondent's three counsel, the Court of Appeals rejected petitioner's contentions that the hours allowed were duplicative and unreasonably high, stating simply that "having reviewed" those undifferentiated time records the district court judge "acted well within his discretion" in concluding that the 769¾ hours claimed did not represent duplicative or unnecessary efforts (p. 2a). The Court of Appeals also rejected petitioner's assertion that the rates claimed (ranging from $95 per hour for one and a half years of experience to $105 per hour for five years of experience) were unreasonably high. Relying on *Cohen* v. *West Haven Board of Police Commissioners*, 638 F. 2d 446 (2d Cir. 1980), a Title VII action in which rates of $20 per hour to $80 per hour had been awarded (*ibid.*, p. 505 n. 14); on *Neely* v. *City of Grenada*, 624 F. 2d 547 (5th Cir. 1980), wherein rates of $77.77 and $100 per hour were awarded in an employment discrimination case in which relief was granted against "virtually all employment practice of an entire municipality in all its departments" (p. 551); and on *City of Detroit* v. *Grinnell Corp.*, 560 F. 2d 1093 (2d Cir. 1977), wherein rates of $90 to $125 per hour were awarded to experienced antitrust attorneys, the court below concluded that the rates awarded here were "comparable to the rates 'normally charged for similar work by attorneys of like skill in the area' ". (p. 2a). Finally, the Court of Appeals affirmed the award of a 50% bonus for the reasons set

forth in the district court opinion, providing no greater elucidation of the facts allegedly supporting those reasons than had been provided by the district court (p. 3a).

The Reasons for Granting the Writ

Introduction

The Civil Rights Attorney's Fees Award Act of 1976 (42 U.S.C. § 1988) was intended to serve the laudable objective of encouraging the enforcement of civil rights laws by authorizing courts in their discretion to "allow the prevailing party [in an appropriate civil rights action] . . . a reasonable attorney's fee as part of the costs." But since Congress did not insert any language in § 1988 setting forth standards, criteria or payment scales to be applied in determining the reasonableness of an attorney's fee, the burden of developing and defining such standards has been left to the courts.*

Although attempts to impose standards in the determination of attorney's fee applications were made by federal courts prior to the enactment of § 1988 in connection with the enforcement of the attorney's fee provisions of other federal laws, particularly Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-5[k])** and the Clay-

* The House Report accompanying the Civil Rights Attorney's Fees Award Act of 1976 defined a "reasonable" attorney's fee as that which should be "adequate to attract competent counsel" without producing "windfalls to attorneys." H.R. Report, No. 1558, 94th Cong. 2nd Sess. 6 (1976).

** See, *e.g.*, *Johnson* v. *Georgia Highway Express, Inc.*, 488 F. 2d 714 (5th Cir. 1974). The Fifth Circuit in that opinion listed twelve factors which should be considered in determining reasonable attorney's fees. Although the *Johnson* opinion has been relied upon by

(footnote continued on next page)

ton Antitrust Act (15 U.S.C. § 15),* neither the body of law prior to 1976 nor the five years of judicial experience since the enactment of the Civil Rights Attorney's Fees Award Act has created a set of uniform or equitable and workable standards for determining "reasonable" attorney's fees. Indeed, a recent extensive study of attorney's fee awards in each of the eleven federal circuits revealed that not only are there major diffrences in the manner and standards by which such awards are determined among the circuits, but frequently there are major inconsistencies within the same circuits. See A. Miller, *Attorneys' Fees in Class Actions, A Report to the Federal Judicial Center* (1980), Ch. 3. Nearly two-thirds of the judges responding to the survey conducted by Prof. Miller concluded that attorney's "fee abuses were a serious problem." Miller *op. cit.* p. 264. The most serious abuses included excessive hours claimed, duplication of effort, inflated time sheets and excessive hourly rates claimed by attorneys. *Ibid.*, Ch. 5.

A survey of civil rights cases decided between 1974 and 1979 shows that the rate of compensation awarded civil

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many federal courts and was cited with approval in the House Report that accompanied § 1988 (House Report No. 94-1588 at p. 8), experience has shown most courts merely list *Johnson* factors without being able to ascribe a monetary value to them. The Sixth Circuit Court of Appeals recognized this problem in *Northcross* v. *Board of Education of Memphis City Schools*, 611 F. 2d 624, 642 (1979) when, after citing the twelve *Johnson* factors, it observed: "We have learned through experience, however, that merely providing a check list of factors to consider does not lead to consistent results, or, in many cases, reasonable fees. Many of the factors are overlapping, and there is no guidance as to the relative importance of each factor, or, indeed, how they are to be applied in a given case."

* See, *e.g.*, *City of Detroit* v. *Grinnell Corp.*, 495 F. 2d 448 (2nd Cir. 1974); *City of Detroit* v. *Grinnell Corp.*, 560 F. 2d 1093 (2nd Cir. 1977); *Lindy Bros.* v. *American Radiator Standard Sanitary Corp.*, 487 F. 2d 161 (3rd Cir. 1973).

rights attorneys varied by 685%. Comment, *Calculation of a Reasonable Award of Attorney's Fees Under the Attorney's Fee Award Act of 1976,* 13 John Marshall Law Review, 331, 337-382 (Winter, 1980). Another study of 28 reported cases involving attorney's fee determinations in the federal courts noted that 13 cases contained "absolutely no articulated reason for the amount awarded." See Berger, *Court-Awarded Attorneys' Fees: What is "Reasonable"?* 126 U.Pa.L.Rev. 281 (1977).

In light of the unsettled nature of this area of law, the Court of Appeals' summary affirmance of the district court's opinion pursuant to § 0.23 of the Rules of the Second Circuit which, by its terms, is applied when the panel "believes that no jurisprudential purpose would be served by a written opinion" represents an improper evasion of the Court of Appeals' supervisory responsibility to provide needed standards within the Second Circuit for determination of attorney's fees.

Further, several aspects of the district court's decision squarely conflict with decisions of other courts of appeals which, unlike the Court of Appeals for the Second Circuit, have attempted to provide standards to ensure that awards of attorney's fees are, as required by § 1988, "reasonable". First, the "bonus" awarded by the district court has specifically been rejected by the Court of Appeals for the Sixth Circuit as unauthorized under § 1988. See *Northcross* v. *Board of Education of the Memphis City Schools,* 611 F. 2d 624, 638 (1979), *cert. denied,* 447 U.S. 911 (1980). Moreover, the factors relied on by the district court to justify the award of a bonus are in conflict with other federal court decisions.

The standard allegedly applied by the district court to set "reasonable" rates, i.e., rates "normally charged for similar work by attorneys of like skill in the area", as misapplied here to award rates significantly higher than the most generous of the disparate rates ever awarded in the Southern District of New York for this type of case. Indeed, the nationwide disparity in rate setting has caused several courts to abandon the above standard in favor of a cost-plus reasonable profit analysis, which we urge this Court to adopt here.

Finally, the manner in which the district court summarily disposed of petitioner's arguments concerning the unexplained duplication of effort among plaintiff's three attorneys facially conflicts with decisions of the Courts of Appeals for the Fifth, Sixth and Eighth Circuits.

The present confusion in the award of attorney's fees, exacerbated within the Second Circuit by the summary manner in which the attorney's fee application here was treated by the court below, facially conflicting with the opinions of other courts of appeals and district courts, underscores the vital need for definitive rulings by this Court on the standards to be applied in the determination of reasonable attorney's fee awards.

A. The award of a 50% "bonus" to respondent's attorneys was not authorized by 42 U.S.C. § 1988. No parallel exists here to the situation where attorneys create an "equitable fund" from which the "bonus" would be paid; a "bonus" to be paid by taxpayers here is tantamount to punitive damages (proscribed in *City of Newport* v. *Fact Concerts, Inc.*).

There is not a word in 42 U.S.C. § 1988 which speaks of, or authorizes, the award of a "bonus" or premium in the determination of an attorney's fee award. Nevertheless, the courts below approved the grant of a 50% bonus that was sought by respondent's attorney in addition to the so-called lodestar determination (total hours worked multiplied by the hourly rates awarded). The granting of the bonus had the effect of raising the hourly rates awarded to respondent's attorneys to $142.50 for work performed by an attorney with one and one-half years of experience to $157.50 an hour for an attorney with four years of experience.

The award of a bonus by the Second Circuit Court of Appeals in this case is contrary to the position taken by the Sixth Circuit Court of Appeals in *Northcross* v. *Board of Education of the Memphis City Schools*, 611 F. 2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980), where that Court stated that:

> "... a 'bonus' multiplier, awarded 'to compensate the attorneys for vindicating important but often unpopular constitutional rights,' id., at 715, is not authorized by either the Emergency School Aid Act or by Section 1988. Such a 'bonus' would indeed be a 'windfall', unnecessary to attract competent counsel, and grossly unfair to the defendants, who in most cases will be

> paying the award out of public funds. We see no reason to allow individual attorneys, no matter how important the rights they have vindicated, to receive unearned personal gain at the public expense." 611 F. 2d at 638.

The concept of a "bonus" in the grant of attorney's fees is contrary to the purpose of Section 1988 which was intended to reimburse prevailing parties for the actual costs of civil rights litigation, not to produce windfalls to private counsel. The Senate report which accompanied the bill which became § 1988 stated, in pertinent part:

> "If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with immunity, then citizens must have the opportunity *to recover what it costs them* to vindicate these rights in court." Sen. Rep. 94-1011, 94th Cong., 2nd Sess., reprinted in 1976 U.S. Code Cong. and Administrative News, pp. 5908, 5910.

Concededly, there has been much confusion in the manner in which courts have approached the issue as to whether a bonus can or should be added to an attorney's fee award. Much of this confusion stems from the development of the premium concept within the context of the "equitable fund" theory or "common fund" doctrine which has principally involved antitrust or stockholder derivative actions. In such cases, the district court is required to act as a fiduciary to assure that the attorneys who have created a fund shall receive their equitable share of it, which, where their efforts involved a considerable risk of not receiving any kind of compensation at all, might include receiving a larger portion of the fund that they had recovered for their

class than their hours and rates alone would warrant.* See *City of Detroit* v. *Grinnell Corp.*, 560 F. 2d 1093, 1099 (2nd Cir. 1977).

By contrast, in the case at bar, as in most § 1983 cases, the award of a bonus or premium to respondent's attorneys would not come out of a common fund created by their efforts but would have to come out of the public fisc.

Where, as here, the attorneys' fees awarded by the courts below have grossly exceeded the bounds of reasonable compensation, the award must be regarded as a windfall for respondent's counsel. In this context, the award of a bonus which must be paid by the State's taxpayers on behalf of the petitioner State officer must be viewed in the same light as an award of punitive damages. In this respect, the recent opinion of this Court in *City of Newport* v. *Fact Concerts, Inc.*, 49 U.S.L.W. 4860 (June 23, 1981), which held that punitive damages may not be awarded against a municipality in a § 1983 action, is pertinent. In noting the effect that such awards have on innocent taxpayers, the Court observed (at p. 4865):

> "[P]unitive damages imposed on a municipality are in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction in public services for the citizens footing the

* A contingency increase is not in the nature of a "bonus"; rather, as in non-statutory fee setting, it is an increase sufficient to compensate for the actual risk of not being paid at all. In any event, it can have no application here. Respondent's Legal Aid attorneys do not pursue fee-generating cases and, therefore, cannot be said to have taken the risk of no remuneration. *Vecchione* v. *Wohlgemuth*, 481 F. Supp. 776, 794-95 (E.D. Pa. 1979); *Armstrong* v. *Reed*, 462 F. Supp. 496, 502 (N.D. Miss. 1978).

bill. Neither reason nor justice suggests that such retribution should be visited on the shoulders of blameless or unknowing taxpayers." (footnote omitted)

Indeed, courts have properly eschewed augmenting fees which fall upon the shoulders of blameless taxpayers. See *Northcross* v. *Board of Education, supra,* at 638; *Chastang* v. *Flynn Emrech Co.,* 541 F. 2d 1040, 1045 (4th Cir. 1976); *Keyes* v. *School District No. 1, Denver, Colo.,* 439 F. Supp. 393, 414 (D. Colo. 1977); *Rios* v. *Enterprise Assoc. Steamfitters Local No. 638,* 400 F. Supp. 993, 996-97 (S.D.N.Y. 1975) *aff'd. sub nom. E.E.O.C.* v. *Enterprise Assoc. Steamfitters Local No. 638,* 542 F. 2d 579 (2d Cir. 1976) *cert. den.* 420 U.S. 911 (1977).

The clear conflict between the opinions below and the decision in *Northcross,* as well as the implicit conflict between the opinions below and this Court's decision in *City of Newport,* can only be resolved by this Court's exercise of jurisdiction over this case.

B. The standard currently applicable to statutory rate setting, i.e., rates "normally charged for similar work by attorneys of like skill in the area", is demonstrably inadequate, particularly in areas of law practiced largely by organizations that do not bill clients for legal services. It should be replaced by the more reliable "cost-plus reasonable profit" analysis or by a fixed hourly ceiling.

The general standard that federal courts have held applicable for the determination of hourly rates under § 1988 is rates "normally charged for similar work by attorneys of like skill in the area". See, *e.g., Cohen* v. *West*

Haven Bd. of Police Commissioners, 638 F. 2d 496, 505 (2nd Cir. 1980); *Johnson* v. *Georgia Highway Express, Inc., supra*, at 718. The inadequacy of this standard is evidenced by the unexplainable variations in the rates awarded within and between all jurisdictions since the enactment of § 1988. See *ante* pp. 10-11. The rates awarded in civil rights cases in the Southern District of New York during 1980-81 provide a graphic example of the futility of this standard,* and the rates set in the case at bar (ranging from $95 for 1½ years of experience to $105 for 5 years) far exceed even the most generous of the disparate rates previously awarded within that jurisdiction.

The problem created by resort to the nebulous standard of rates "normally charged for similar work by attorneys of like skill in the area" is intensified when, as here, a district court judge is called on to invent a rate for an attorney employed by a non-profit organization which does not bill

* See *EEOC* v. *Sage Realty Corp.*, 521 F. Supp. 263 (S.D.N.Y. 1981) (rates awarded ranged from $30 per hour for 1 year experience to $110 per hour for 11 years); *Bradford* v. *Blum*, 507 F. Supp. 526 (S.D.N.Y. 1981) ($75 for less than 2 years of experience, $90 for more than 2 years of experience); *Cleary* v. *Blum*, 507 F. Supp. 514 (S.D.N.Y. 1981) ($45 for 1 year, $60 for 7 years, $75 for eleven years); *Swift* v. *Blum*, 502 F. Supp. 1140 (S.D.N.Y. 1980) ($75 for 3-4 years, $100 for 9 and 12 years); *St. Marie* v. *Eastern Railroad Assoc.*, 497 F. Supp. 800 (S.D.N.Y. 1980) *rev'd on other grounds*, 650 F. 2d 395 (2d Cir. 1981) ($100 for brief writing and $80 for all other work, for attorney with 15 years of experience); *Sharrock* v. *Harris*, 489 F. Supp. 913 (S.D.N.Y. 1980) ($50 for 7 years, $75 for 12 and 16 years); *Becker* v. *Blum*, 487 F. Supp. 873 (S.D.N.Y. 1980) ($75 for less than 2 years, $90 for more than 2 years); *Rodriguez* v. *Bernstein*, 79 Civ. 1294 (order of *Broderick*, D.J., dated April, 1980) ($85 per hour for 6 years of experience and $110 per hour for 10 years); *Regina* v. *Dalsheim*, 78 Civ. 1627 (Memorandum decision of *Stewart*, D.J., dated September 15, 1980) ($75 for court appearances, $35 for research, $25 for meetings, letters, and phone conversations for private attorney who did not supply his background).

clients for work performed in an area of law practice almost entirely occupied by similar non-billing organizations.* Recognizing the futility of the rates "normally charged" standard in cases such as the one at bar, a number of federal courts have adopted a cost analysis approach in the determination of attorneys' fees. See, *e.g.*, *Alsager* v. *District Court of Polk County*, 447 F. Supp. 572 (S.D. Iowa 1977); *Page* v. *Preisser*, 468 F. Supp. 399, 403 (S.D. Iowa 1979); *Cintron* v. *Brentwood U.F.S.D.* (unreported, 77 Civ. 1310, E.D.N.Y., February 6, 1979, *Mishler*, C.J.).

In 1978, the Court of Appeals for the District of Columbia Circuit adopted the cost-plus standard in *Copeland* v. *Marshall*, 594 F. 2d 244, recognizing that considerations of the cost of engaging in litigation are "at the heart of the firm's own accounting process as a business concern." In applying the "cost-plus reasonable profit" formula to a firm engaging in *pro bono* legal work, the Court directed the firm to be reimbursed with an amount commensurate with the salaries paid to the associates, the firm's overhead costs, and an amount that would reflect a return of profit to the partnership. 594 F. 2d at 251. Upon reconsideration and rehearing *en banc*, a majority of the District of Columbia Circuit in *Copeland* returned to the "market value" standard for determining hourly rates. 641 F. 2d (1980).

* Moreover, the manner in which the rates were awarded here again demonstrates the confusion in the lower courts regarding the proper use of the factors set forth in *Johnson* v. *Georgia Highway Express, Inc.*, *supra*, at 717-19. The district court judge justified the rates awarded because he felt that they were "consonant with fee awards in cases of similar complexity and difficulty" (*Johnson* factor #2) (p. 12a). However, *Johnson's* "complexity" factor serves to justify a large number of hours expended; it does not provide justification for high rates. *Copeland* v. *Marshall*, *supra*, at 890; *Northcross* v. *Bd. of Educ.*, *supra*, at 642-43.

However, the majority opinion *en banc* did not reject the equitable nature of the "cost-plus" formula; rather, it expressed the fear that "the proposed 'cost-plus' method of calculating fees would indeed become the inquiry of "massive proportions' that we strive to avoid." 641 F. 2d at 896.

The fear expressed by the majority *en banc* opinion in *Copeland, supra,* concerning the administrative difficulties in determining cost factors is unjustified. The information required by the "cost-plus" formula should be readily available from private attorneys who must maintain business records of their expenses to qualify for deductions for federal income tax purposes. See Treasury Reg. § 1.62-c (1); Treasury Reg. § 1.6000-1. Moreover, legal services organizations are required under the Legal Services Corporation Act, 42 U.S.C. § 2996h(c)(1), and by 45 C.F.R. § 1602 to submit comprehensive financial information regarding their financial operations as a condition to their receipt of federal funding.

In his dissenting opinion in *Copeland, supra,* Judge Wilkey noted that the "cost-plus" formula is clearly consistent with the congressional purpose to attract competent counsel while avoiding windfalls to attorneys, and observed that the effect of the majority's market value approach will be to lead attorneys' fee awards to . . . "Up, Up, and Away!" 641 F. 2d at 908. The decision of the courts below, with their astronomic award, is ample proof of the correctness of Judge Wilkey's prediction.

Nothing in the language of 42 U.S.C. § 1988, nor in its legislative history, precludes the adoption of a formula which would reimburse attorneys for the prevailing party

for their actual costs (salary and overhead) plus a reasonable profit to encourage them to pursue public interest litigation. *Alsager* v. *District Court, supra,* at 577; *Comment: Calculation of a Reasonable Award of Attorneys' Fees Under the Attorneys' Fees Award Act of 1976, supra* at 390-398.

Although the "cost-plus" formula is the most equitable standard to utilize in the determination of reasonable hourly rates, the approach which would be the easiest for the district courts to administer would be the imposition of a fixed hourly standard. This was the approach followed by Congress in the Criminal Justice Act, 18 U.S.C. § 3006A(d), which authorized attorneys representing indigent defendants in criminal proceedings to receive $20 an hour for out-of-court legal services and $30 an hour for court appearances.* While those rates may be criticized as being too low, federal courts have experienced little difficulty in attracting private attorneys to represent indigent criminal defendants.

In the recently enacted Equal Access to Justice Act, Public Law 96-481, Title II, § 203 (codified as 5 U.S.C. § 504) and § 204 (codified as 5 U.S.C. § 2412), Congress imposed a $75 an hour maximum rate (subject to cost of living increases and special factors) for attorney's fees sought against the federal government.** The $75 an hour

* Although the Second Circuit cited the rates authorized by the Criminal Justice Act as a "permissible pay scale" for an attorney's fee award in *Equal Employment Opportunity Com'n.* v. *Enterprise Ass'n. Steamfitters Local No. 638,* 542 F. 2d 579, 593 (1976), it does not appear that any subsequent attorney's fee opinions of the district courts within the Second Circuit have followed this standard.

** 42 U.S.C. § 1988 excluded the Federal Government from being subjected to attorney's fee awards.

standard in that Act must be taken as the latest expression by Congress as to what constitutes a reasonable rate for an attorney's fee award.

C. The district court abused its discretion when it failed to require respondent's attorneys to specify how their services were divided to avoid unreasonable and unnecessary duplication of effort.

Since respondent's attorney's fee application revealed that at virtually all times at least two and often three attorneys were working on every phase of this case, it was incumbent upon the district court to inquire whether there was unnecessary duplication of effort. *Johnson* v. *Georgia Highway Express, Inc., supra,* at 717; *Furtado* v. *Bishop,* 635 F. 2d 915, 922 (1st Cir. 1980). Indeed, when more than one lawyer is involved, to avoid the time-consuming task of examining each document for which time is claimed, many courts have applied a percentage reduction to the hours claimed to account for duplication of effort. See, *e.g., Furtado* v. *Bishop, supra,* at 923; *Northcross* v. *Board of Education, supra,* at 636; *Copeland* v. *Marshall,* 641 F. 2d 880, 903 (D.C. Cir. 1980).

Here, the district court judge summarily rejected petitioner's claims regarding unreasonable duplication of effort, relying on conclusory statements regarding the complexity of the case (p. 11a) or that he was "satisfied" that no duplication had occurred (*ibid.*). Thus, that court not only failed to take into account the inherent duplication of effort here, but did so in a manner, affirmed by the Court of Appeals, which is facially invalid under the decisions of the Fifth, Sixth, and Eighth Circuits. See *Davis* v.

Fletcher, 598 F. 2d 469, 470 (5th Cir. 1979); *Northcross* v. *Bd. of Educ., supra*, at 636; *International Travel Arrangers Inc.* v. *Western Airlines, Inc.*, 623 F. 2d 1255, 1276 (9th Cir. 1980), all requiring district judges to specify the facts underlying determinations regarding the reasonableness of hours claimed, and condemning reliance on the type of conclusory statements proffered here as the sole justification of reasonableness.

The necessity of the factual specificity requirement can find no greater illumination than in the instant case. The district court's resort to conclusory statements as its sole basis for rejecting petitioner's argument that the time claimed largely reflected unreasonable duplication evades the fact that although 418½ hours, more than half the total time expenditure claimed, was spent on motion papers produced by joint effort, virtually none of the time records give *any* indication of how responsibility for the bulk of those motions was divided.*

As appears, the district court's abuse of its authority in regard to the determination of the reasonableness of the hours claimed is not unique to this case or even to the Second Circuit. In view of the Court of Appeals' affirm-

* For example, approximately 151 hours, or twenty-one 7½ hour days (over four work weeks) was claimed for papers submitted in support of respondent's cross-motion for summary judgment and in opposition to petitioner's and the federal defendant's motions to dismiss. Ms. Moynihan claimed 82 hours, Ms. Galowitz claimed 59 hours, and Mr. Fried claimed 9¾ hours. Ms. Moynihan's time records simply state that she spent those hours on "Research and preparation of motion for summary judgment and of opposition papers to state and federal motions". Ms. Galowitz's time records similarly reveal that she spent her hours on "Research and preparation of motion for summary judgment and opposition papers to state and federal motions."

ance of that abuse, in conflict with the remedial efforts of the Courts of Appeals of three other circuits, this Court should settle the issue once and for all by setting clear and uniform standards for the determination of the reasonableness of hours claimed in attorneys' fees applications.

D. The Court of Appeals improperly evaded its supervisory responsibility to provide needed standards within the Second Circuit for the award of attorney's fees by affirming the officially reported district court opinion in a summary decision.

The Court of Appeals' improper use of local rule § 0.23 to evade its supervisory responsibility over the district courts by issuing summary unpublished opinions affirming officially reported district court decisions in unsettled areas of circuit-wide importance is currently an issue before this Court in *Board of Education* v. *Rowley*, No. 80-1002, *cert. granted* 11/2/81 (see 50 U.S.L.W. 3334). The abuse of judicial authority by resort to § 0.23, which has become increasingly frequent within the Second Circuit,* is clearly demonstrated by this case.

The persistent and serious inconsistencies among attorney's fees awards is well documented (see *ante* pp. 10-11, 17n.), as is the Second Circuit's failure to address itself to this problem. See *EEOC* v. *Sage Realty Corp.*, 521 F. Supp. 263, 268 (S.D.N.Y. 1981) (specifically stating that the Second Circuit "has yet to specify criteria to be considered in determining an appropriate fee award"). Yet, in this

* The underlying decision on the merits of the relief granted in this class action was also affirmed in a summary unpublished opinion rendered pursuant to § 0.23. See 628 F. 2d 1345.

unsettled area of the law, the court below rendered its opinion under a local rule which, by its terms, is applied when the panel "believes that no jurisprudential purpose would be served by a written opinion".

Although the summary opinions rendered pursuant to § 0.23 "do not constitute formal opinions of the court", the general pronouncements in the officially reported district court opinion, to which the affirmance of the Court of Appeals lends great weight, are not limited to the facts of this case and will, therefore, serve as precedent for future fee determinations. Thus, the summary manner in which the district court approved the total number of hours claimed and the high hourly rates requested by respondent's attorneys, and the sanction given to the award of a "bonus" in a case decided on a motion for summary judgment, can be expected to generate similar excessive attorney's fee awards.

In light of the Court of Appeals' abdication of its responsibility to provide uniform standards to be followed within the Second Circuit for the award of attorney's fees, it can only be anticipated that the current helter-skelter approach will continue unless this Court now resolves the issues raised by this petition.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
January 15, 1982

Respectfully submitted,

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APPENDIX

Order of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit at the United States Courthouse in the City of New York, on the 19th day of October, one thousand nine hundred and eighty-one.

Present:

HONORABLE IRVING R. KAUFMAN,
HONORABLE JAMES L. OAKES,
HONORABLE AMALYA L. KEARSE,
Circuit Judges

81-7385

ELLEN STENSON, individually and on behalf of all other persons similarly situated,

Plaintiff-Appellee,

v.

BARBARA BLUM, individually and in her capacity as Commissioner of the New York State Department of Social Services, BLANCHE BERSTEIN, individually and in her capacity as Commissioner of the New York City Department of Social Services and JOSEPH CALIFANO, individually and as Secretary of Health, Education and Welfare of the United States,

Defendants,

BARBARA BLUM, individually and in her capacity as Commissioner of the New York State Department of Social Services,

Defendant-Appellant.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

1. Appellant's claim that the award of attorney's fees in the amount of $118,968 pursuant to 42 U.S.C. § 1988 is based on duplicative and otherwise excessive hours and unreasonably high hourly rates is without merit. Having reviewed time records identifying the projects for which compensation was requested and the time spent by the three attorneys on each project, Judge Sweet acted well within his discretion in concluding that the 769¾ hours for which the attorneys requested compensation did not represent duplicative or unnecessary efforts. *Siegal* v. *Merrick*, 619 F.2d 160 (2d Cir. 1980).

2. In granting compensation at rates of $105.00 for Mr. Fried, $100.00 for Ms. Galowitz, and $95.00 for Ms. Moynihan, Judge Sweet approved compensation at hourly rates comparable to the rates "normally charged for similar work by attorneys of like skill in the area," *Cohen* v. *West Haven Board of Police Commissioners*, 638 F.2d 496, 505 (2d Cir. 1980), and those rates frequently granted in civil rights and other equally complex cases, *see, e.g., Neely* v. *City of Grenada*, 624 F.2d 547, 551 (5th

Cir. 1980); *City of Detroit* v. *Grinnell Corporation*, 560 F.2d 1093 (2d Cir. 1977).

3. Since the procedural and substantive issues in this case were extremely complicated, the quality of representation high, the outcome of great benefit to a large class of needly people, and the ultimate resolution uncertain, Judge Sweet acted within his discretion in making an upward adjustment of fifty percent in the figure determined by multiplying the number of hours worked by the rate of compensation. *See Cohen* v. *West Haven Board of Police Commissioners, supra*, 638 F.2d at 505 (court may make upward or downward adjustments to take account of such subjective factors as the risk and complexity of the litigation and the quality of the representation).

/s/ IRVING R. KAUFMAN

Irving R. Kaufman

/s/ JAMES L. OAKES

James L. Oakes

/s/ AMALYA L. KEARSE

Amalya L. Kearse
Circuit Judges

Opinion of the United States District Court for the Southern District of New York

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

78 Civ. 6044 (RWS)

ELLEN STENSON, Individually and on behalf of all other persons similarly situated,

Plaintiff,

against

BARBARA BLUM, Individually and in her capacity as Commissioner of the New York State Department of Social Services; STANLEY BREZENOFF, individually and in his capacity as Commissioner of the New York City Department of Social Services; and PATRICIA HARRIS, individually and in her capacity as Secretary of Health, Education and Welfare of the United States,

Defendants.

Appearances:

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SWEET, D.J.

In this, the final installment in this difficult litigation, attorneys for the plaintiff class seek an award of $118,968 as payment for their services in connection with their conduct of this action. The motion is granted.

The factual background of, and legal issues raised by, this civil rights action are largely set forth in a prior opinion of this court, *Stenson* v. *Blum*, 476 F. Supp. 1331 (S.D.N.Y. 1979), *aff'd*, 628 F.2d 1345, *cert. denied*, 101 S.Ct. 239 (1980), and will not be detailed here. Briefly, the case involved a challenge to termination procedures utilized for certain recipients of Medicaid. The plaintiff class prevailed in its claims against the State defendants, and secured class-wide relief guranteeing certain due process rights to Medicaid recipients. The legal issues involved were both novel and complex, involving a complicated interaction between state and federal law and a contract between the

state and federal governments. By prior opinion, *id.*, the named plaintiff prevailed in her motion for class certification and in her prayer for injunctive relief against the State of New York. In addition, I awarded plaintiff reasonable attorney's fees, pursuant to 42 U.S.C. § 1988. *Id.* at 1343. The instant motion seeks to establish the amount of the fees to which attorneys for the plaintiff class are entitled.

Throughout this litigation, the plaintiff class was represented by The Legal Aid Society ("Legal Aid"), through its staff attorneys Arthur J. Fried ("Fried"), Ann Moynihan ("Moynihan"), and Paula Galowitz ("Galowitz"). Fried is a 1975 graduate of Cornell Law School with extensive experience in litigation involving government benefits. He has been an attorney with Legal Aid for over three years. Before then, he was a law clerk in this district for two years. Moynihan is a 1977 graduate of New York University Law School, who has also worked as a Legal Aid attorney for well over three years. Galowitz received her J.D. degree from Brooklyn Law School in 1976. She, too, has been with Legal Aid for more than three years. Like Fried, Moynihan and Galowitz have considerable experience in litigation involving government benefits and the legal rights of the indigent.

Fried, Moynihan and Galowitz request for $118,968 in fees is based on a detailed recitation of the hours each expended on this litigation and the tasks they performed. They have submitted a summary breakdown of the fees sought, as follows:

Attorney	*Hours*	*Rate*	*Lodestar*	*Incentive Award*	*Total*
Ann Moynihan	487 hrs. 50 min.	$ 95/hr.	$46,343	$23,172	$ 69,515
Paula Galowitz	166 hrs. 15 min.	$100/hr.	16,625	8,312	24,937
Arthur Fried	115 hrs. 40 min.	$105/hr.	16,344	8,172	24,516
					118,968

The Defendant does not contest plaintiff's entitlement to fees. However, she does object to the specific fee request made, claiming, first, that the rates sought are exorbitant, second, that plaintiff's counsel failed to differentiate between time spent on issues involving the state defendant and those involving the federal and city defendants, third, that the claim unjustifiably asks reimbursement for time spent on issues on which plaintiff did not prevail, fourth, that the hours spent were excessive, fifth, that plaintiff's request is inflated by duplication of attorneys' labor, and, finally, that plaintiff should not be awarded a bonus.

This Circuit utilizes a two-step process in the calculation of attorney's fees. First, the number of hours expended by each attorney involved in the case is multiplied by the hourly rate normally charged for similar work by attorneys of like skill in the area, to obtain a "lodestar" figure. Second, the lodestar figure may be adjusted upward or downward to reflect factors such as the risk and complexity of the litigation and the quality of the representation. *See Cohen* v. *West Haven Board of Police Commissioners,* No. 80-7233 (2d Cir. Dec. 23, 1980); *City of Detroit* v. *Grinell Corp.,* 495 F.2d 448, 470-71 (2d Cir. 1974). This process is applied to the calculation of attorneys' fees in actions under the civil rights statutes just as it is applied to other types of actions, *see Cohen, supra,* slip opinion at 718, n.15; *Mid-Hudson Legal Services, Inc.* v. *G & U, Inc.,* 578 F.2d 34 (2d Cir. 1978), and to awards to legal services associations just as to awards to private counsel, *id.; Torres* v. *Sachs,* 538 F.2d 10 (2d Cir. 1976); *Becker* v. *Blum,* 487 F. Supp. 873 (S.D.N.Y. 1980). Before applying this formula to the fee application before me, I will address defendants' objections to it.

Defendants first objection is that the rates sought are exorbitant. I disagree. The rate used in calculation of the lodestar amount depends, as stated above, on two factors: the rate charged for (1) similar work by (2) attorneys of like skill in the area. The rates requested here are consonant with fee awards in cases of similar complexity and difficulty. *See, e.g., Population Services International* v. *Carey,* 476 F. Supp. 4 (S.D.N.Y. 1979) (in action challenging, state statute governing distribution of contraceptives on constitutional grounds, fees ranging from $60 per hour for associates to $120 per hour for partners found reasonable); *City of New York* v. *Darling-Delaware,* 440 F. Supp. 1132 (S.D.N.Y. 1977) (in antitrust case, hourly rates of $150-$175 termed reasonable). Furthermore, they are fair in view of these attorneys experience and expertise, *see Becker* v. *Blum, supra,* (fees of $75 for attorneys with fewer than two years experience since bar admission and $90 for those admitted more than two years termed an "understatement.") The quality of work performed by counsel throughout this case was high. In view of all of these considerations, I do not find the requested rates, from $95 per hour to $105 per hour, excessive. Nor do I deem it necessary to vary the hourly rate awarded with the nature of the service performed, as defendant would have me do. *See Cohen* v. *West Haven Board of Police Commissioners, supra,* (decision whether to vary rate within trial court's discretion); *Blank* v. *Talley,* 390 F. Supp. 1 (S.D.N.Y. 1975) (average rates applied to all types of services).

Defendant's second objection, to counsel's failure to differentiate time spent on issues involving the three defendants, is also without merit. Although plaintiff's fee

request initially encompassed time spent on issues involving only the city defendants, it has been modified to exclude hours spent on those issues. Insofar as the request fails to differentiate time spent on issues involving the federal and state defendants, I find that failure no bar to full compensation here. The legal issues involving the federal and state defendants were intermingled in such a fashion in this case that such differentiation would not be possible, and, indeed, would not accurately reflect time spent on issues of importance to the claims against the state. The federal issues were bound up with the state claims in such a way that it is fair to base an award against the state on hours devoted to both. *See generally Stenson* v. *Blum, supra.*

Defendants' third objection is that plaintiffs' ask reimbursement for time spent on issues on which plaintiff did not prevail. Defendants cite, in particular, time spent on contempt motions which were not granted and intervenor motions which were denied. This objection, too, is without merit, for several reasons. First, although the intervenor motions were denied, they were denied because plaintiff succeeded on a motion for certification of a class in which the proposed intervenors were included, thus rendering intervention unnecessary. *See id.* Although in a technical sense plaintiff may be said not to have prevailed on those motions, in practical terms they were successful in achieving the desired result. Second, the first of the two contempt motions, brought to secure compliance with this court's decree, was denied only after compliance was already achieved. That success was due in part to the filing of the contempt motion itself. Again, to term this result a failure to "prevail" would be to ignore reality. The second contempt motion also sought to secure compliance with this

court's decree and was denied not because it was without merit, but because the defendant had moved for a stay pending a determination of her petition for a writ of *certiorari*. To deny attorneys' fees for the filing of this motion, which cannot be said to have been unjustifiably brought, would not comport with the statutory goal of encouraging civil rights actions. Fee awards are appropriate for time spent on efforts to secure compliance with court decrees, no less than for time spent securing those decrees. *See Northcross* v. *Board of Education of Memphis City Schools*, 611 F.2d 624, 637 (6th Cir.) *cert. denied*, 477 U.S. 911 (1980); *Miller* v. *Carson*, 628 F.2d 346, 348 (5th Cir. 1980) (fees granted for post-judgment motions, including motion for contempt, which "although never ripening into courtroom activity," had effect of securing compliance with injunction.)

Moreover, I would deem it appropriate to grant fees for the time spent on issues on which the plaintiff did not formally prevail even if the considerations just discussed were not present. The requirement that the party requesting fees have "prevailed" has been interpreted to mean prevail on the case as a whole. *See Northcross, supra.* In *Northcross* the circuit court rejected the approach of the court below, which had declined to award fees for those issues on which plaintiff had not prevailed, saying that once it is determined that plaintiffs prevailed on the action as a whole, they are entitled to attorneys' fees for all time reasonably spent on the matter. That approach supports the award of fees for time spent on the contempt and intervenor motions here, even if those motions are deemed unsuccessful. *See also Seigal* v. *Merrick*, 619 F.2d 160, 164-65 (2d Cir. 1980); *Brown* v. *Bathke*, 588 F.2d 634 (8th Cir.

1978). *Cf. Gagne* v. *Maher*, 594 F.2d 336, *aff'd.*, 100 S.Ct. 2570 (1980) (fee award under § 1988 appropriate even though constitutional issue not reached). *But see Nadeau* v. *Holgemoe*, 581 F.2d 275 (1st Cir. 1978) (fees awarded only for hours spent on issues on which plaintiff prevailed).

The fourth objection raised is that the hours spent were excessive. Again, I disagree. As stated above, the issues presented were complex, and the proceedings fully warranted the hours devoted to them.

I also reject defendants' contention that the attorneys' efforts were duplicative. I am satisfied by the affidavits submitted by plaintiffs' counsel that the work performed outside of the courtroom was divided in such a way as to avoid duplication. Furthermore, I reject defendants' contention that plaintiffs' attorneys unjustifiably appeared as a team in court and at conferences. This Circuit recently expressed its reluctance to deprive counsel of assistance during such conferences and court appearances. *See Siegal* v. *Merrick, supra. See also Willoughby* v. *New York City Housing Authority*, 79 Civ. 2811 (CLB) (Dec. 4, 1980). This court, like the court in *Willoughby*, respects counsel's decision regarding staffing of appearances, and will not reject that portion of the fee application which reflects those appearances.

Finally, defendants contest plaintiffs' application for a bonus, or incentive award, above the lodestar amount. The main ground of the objection is that the award will be paid from the public fisc. However, the law in this Circuit is clear that attorneys' fees are to be calculated in the same manner regardless of whether the defendant is a private or a public entity. *See Torres* v. *Sachs, supra; Population*

Services International v. *Carey, supra,* at 9 n.5. Therefore, if a bonus is otherwise appropriate here, it should not be withheld because the award is to be paid from public funds.

I now turn to the calculation of fees. I have already decided that both the rate of payment requested and the hours expended by plaintiffs' counsel are reasonable. Therefore, the lodestar figure is that which they propose: $79,312.

On the facts of this case, I deem an upward adjustment of the lodestar amount appropriate. The quality of representation was high. The litigation was complex. The issues presented were novel, and the undertaking therefore risky. Finally, the outcome was of great benefit to a large class of needy people. All of these factors render an incentive award appropriate. *See Cohen* v. *West Haven Board of Police Commissioners, supra* (factors include risk, complexity, and quality of representation); *Population Services International* v. *Carey, supra* (social benefits of the action a factor in upward adjustment of lodestar amount); *Beazer* v. *New York City Transit Authority,* 558 F.2d 97 (2d Cir. 1977) (complexity or risk of loss on the legal issues and benefit to the clients important factors in bonus award).

Plaintiffs request a bonus of 50% of the lodestar amount. Particularly in view of the complexity of the litigation and the benefit to the class, I find such an award appropriate. *See Population Services International* v. *Carey, supra* (50% bonus awarded); *City of New York* v. *Darling Delaware, supra* (bonus awards of 60% to 200% granted); *Blank* v. *Talley, supra* (50% bonus awarded).

Joint Appendix

Office - Supreme Court, U.S.
FILED
AUG 15 1983
ALEXANDER L. STEVAS,
CLERK

No. 81-1374

IN THE

Supreme Court of the United States

October Term, 1983

BARBARA BLUM, individually and in her capacity as Commissioner of the New York State Department of Social Services,

Petitioner,

against

ELLEN STENSON, individually and on behalf of all other persons similarly situated,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

JOINT APPENDIX

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Petition for Certiorari Filed January 15, 1982
Certiorari Granted May 31, 1983

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Relevant Docket Entries in the United States District Court for the Southern District of New York

ELLEN STENSON v. BARBARA BLUM, *et al.*
78 Civ. 6044 SWEET, J.

DATE	NR.	PROCEEDINGS
12-18-78	1	Filed complaint and issued summons
12-18-78	2	Filed [order] permitting pltf's to file in forma pauperis—Carter, J.
01-05-79	4	Filed summons with [marshall's] return of service served—The Atty Gen Dept. of Justice Wash, D.C. on 12-12-78 # 561323 J. [Califano] HEW Wash, D.C. on 12-12-78 # 561324 Joseph Califano by Pauline Troia on 1-20-78
01-15-79	5	Filed pltf's First interro. to deft. Califano
01-15-79	6	Filed pltf's First interrog. to deft. Blum
01-15-79	7	Filed pltf's First interrog. to deft. Bernstein
01-12-79	8	Filed stip. and order that the The New York City Dept. of Social Services, The NY State Dept. of Social Services and The Dept. of HEW, agree to provide pltf. with interim Medicaid benefits, pltf. application for an order to show cause shall be considered as a motion for class certification and injunction, deft HEW time to answer is ext. to 2-16-79--Sweet, J.
02-16-79	10	Filed deft Blum's responses to pltf's first interrog.
02-20-79	11	Filed ANSWER of [deft.] Joseph A. Califano, [Jr.]
03-05-79	12	Filed deft. Califano's answers to plt's [First] Set of interrog.
03-07-79	13	Filed ANSWER of deft. Barbara Blum

District Court Docket Entries

DATE	NR.	PROCEEDINGS
03-20-79	14	Filed pltf's affdvt. and notice of motion for an order pursuant to rule 23(c)(1) and rule 23(a) and in addition rule 23(b)(2) or in the alternative rule 23(b) (1) (A) or (b) for a prel. injunction, for class certification, and temp. restraining order, and a joinder order ret. 3-30-79
03-20-79	15	Filed pltf. Ellen Stenson and proposed pltf. intervenor Murtagh affdvt. in support of motion for class [certification] and a preliminary injunction
03-20-79	17	Filed pltfs affdvt. and notice of motion for a preliminary injunction for class certification and temp. restraining order ret. 3-30-79
03-20-79	18	Filed pltf-intervenor brief in support of their [application] for intervention and a temp. restraining order and supplemental [brief] of pltf and pltf.-intervenor in support of motion for class [certification] and a prel[.] injunction
03-20-79	19	Filed pltf's brief in support of her application for a temporary restraining order on her own behalf and for class certification and a class-wide prel. injunction
03-27-79	20	Filed deft. Blum affdvt., statement under rule 9(g) and notice of motion for summary judgment under rule 56 dismissing the complaint ret. 3-30-79
03-27-79	21	File-deft. Blum memorandum in support of the State defts motion for summary judgment and in opposition to pltf's motion for a prel. injunction

District Court Docket Entries

DATE	NR.	PROCEEDINGS
03-29-79	22	Filed deft Joseph A. Califano, Jr. notice of cross motion for an [order] under rule 12(c) for judgment on the pleadings [dismissing] the complaint. ret. 3-30-79
03-29-79	23	Filed deft. Califano, memorandum in support of above cross motion for judgment on the pleadings and in opposition to pltf's motions for a prel. injunction and for class [certified.]
03-29-79	24	Filed deft. Califano, Jr. supplemental answers to interrog. 2(c) of pltf's First interrog.
04-09-79	25	Filed City deft's affdvt. and notice of cross-motion for an order pursuant to [rule] 21 [dismissing] the complaint ret. 4-13-79
04-09-79	26	Filed City deft's memorandum in support of above motion to dismiss and in opposition to pltf's motion for a preliminary [injunction]
04-09-79	27	Filed ANSWER of deft Bernstein, [Comm.] of NY City [Dept.] of Social Services AGS
04-09-79	28	[Filed] deft's response to pltf's interrog (First)
04-13-79	29	Filed pltf's affidvt, statement under [rule] 9(g) and notice of motion for an order granting summary judgment. ret. 4-20-79
04-13-79	30	Filed pltf's and pltf-intervenors brief in support of above motion for summary judgment and in opposition to deft's motion for summary judgment etc.
04-16-79	31	Filed pltf and pltf-intervenor brief in support of their motions for summary judgment

DATE	NR.	PROCEEDINGS
		and in opposition to State deft's motion for summary judgment. Fed. defts cross motion for judgment on the pleadings and City [deft's] cross-motion to dismiss (revised according to attached letter)
04-24-79	32	Filed deft. Joseph A. Califano, Jr. affvdt. statement under rule 9(g) and notice of cross-motion for an order pursuant to rule 12(c) judgment on the pleadings or in the alternative for summary judgment. ret. 4-27-79
04-24-79	33	Filed deft. Califano, Jr. reply memorandum in opposition to pltf's motion for prel. injunction and summary judgment
04-26-79	34	Filed defts statement in response to pltf's statement under rule 9(g)
04-26-79	35	Filed State defts memorandum in opposition to pltf's cross-motion for summary judgment and in support of the State deft's motion for summary judgment
04-25-79	35	Filed pltf/intervenor Wilson statement pursuant to rule 9(g)
04-25-79	36	Filed pltf/intervenor Wilson and pltf. brief in support of their cross-motion [for] summary-judgment and in opposition to Federal deft.'s motion for summary judgment
05-02-79	37	Filed deft. Califano, supplemental statement under rule 9(g)
09-18-79	38	Filed OPINION # 49060 pltf seeks compensatory damages for out-of-pocket medical expenses resulting from her termination for

DATE	NR.	PROCEEDINGS
		Medic[aid] etc. [Stenson's] motion for summary judgment is granted in part and denied in part. The motions by the Federal deft. (for summary judgment) and by the City and City deft (to dismiss) are granted and the motion by New York is granted in part and denied in part[.] Stenson shall, within ten days submit to the Clerk of the court a proposed judgment, on ten days notice— Sweet, J. m/n
12-26-79	39	Filed FINAL JUDGMENT—pltff's motion for class certification purs to Rule 23(a) and (b)(2) is granted, the class to be composed of all N.Y.S. residents who received Medicaid due to their eligibility for SSI and, etc[.] . . . suffered a terminal reduction or suspension etc. . . . So Ordered. Sweet[,] J. m/n.
01-24-80	40	Filed defts Blum affdvt. and order to show cause for relief from judgment and a stay. Ordered that pltf. show [cause] why an order should not be [issued] on 2-1-80 relieving deft Blum [from] her [obligation] of the Final Judgment to restore benefits to class members, a stay of execution is granted pending de[termination] of this motion and service to [be] rendered on or before 1-24-80. —Sweet, J.
01-24-80	41	Filed deft. Blum memorandum in support of deft's motion for relief [from] the judgment and for a stay

District Court Docket Entries

DATE	NR.	PROCEEDINGS
01-11-80	42	Filed ORDER that the notice to be sent by the State deft. in accordance with paragraphs 11 and 17 of the Final Judgment entered shall be as indicated herein—Sweet, J. m/n
02-05-80	43	Filed pltfs affirmation in opposition to State deft. Blum's order to show cause seeking relief from the provisions of paragraph 11 and 12 of the Final Judgment.
01-25-80	44	Filed deft. Blum notice of appeal to the USCA for the Second [C]ircuit from the Final Judgment [. . .] of 12-20-79 granting class certification mailed copy to The Legal Aid Society, Robert B. Fiske, Jr. and Joseph M[.] Armstrong
02-13-80	45	Filed pltfs affirmation and notice of motion for an order pursuant to rule 70 adjudging Blum in contempt of Court's judgment of 12-26-79 and directing deft. restore medicaid benefits to all those terminated. ret. 2-22-80
02-14-80	46	Filed pltfs memorandum in support of their motion for contempt and in opposition to deft Blum's motion for relief from judgment and for a stay pending Appeal
02-21-80	46	Filed defts affdvt. in opposition to pltfs motion to hold Commissioner Blum in contempt.
02-21-80	47	Filed defts memorandum in opposition [to] pltf's motion for contempt.
02-21-80	46	Filed AMENDMENT TO JUDGMENT AND ORDER—that the notice required to be sent by the State deft. [accordance] with paragraph 11 of the Final Judgment and [. . .] the Jan-

DATE	NR.	PROCEEDINGS
		uary 4, 1980 order of this court shall be amended to include as indicated herein—Sweet, J. m/n
02-25-80	47	Filed pltfs notice of appeal to the USCA for the Second Circuit from Judgment Entered on 12-26-78 and amended on 2-20-80, mailed copy to [Robert] Abrams Joseph M. Armstrong and Robert B. Fiske, Jr.
03-03-80	—	Filed memo. end. on document on (UNSIGNED ORDER TO SHOW [CAUSE] Motion denied on representation of counsel that consent order granting pltf. preliminary relief will be filed with the court—Sweet, J. [. . .] m/n
02-25-80	48	Filed pltfs notice of appeal to the USCA for the Second Circuit from Judgment ent on 12-26-78 and amended on 2-20-80 as grants deft Harris motion for summary judgment and dismisses pltfs complaint against Harris. Mailed copy to Robert Abrams, Joseph M. Armstrong and Robert B. Fiske, Jr.
03-03-80		Filed deft's amended notice of appeal from amendment to judgment dtd: 2/20/80,M/N to Legal Aid 11 Park Place NYC, US Atty, Joseph Armstrong, Spec Corp Counsel 220 Church St NYC 10013
04-15-80	53	Filed memo. end. on document #45 pltfs motion for an order to hold Blum in contempt of court. [The] State deft [represented] at the hearing on the motion that appropriate measures would be taken to [assure] [compliance] with the judgment of this court. Based upon [this] contempt is

DATE	NR.	PROCEEDINGS
		denied at [this] time with leave to renew in the event of further evidence of non-compliance—Sweet, J. m/n
04-25-80	54	Filed true copy of USCA ORDER, for Second Circuit affirming the Judgment of District Court in accordance with the Court's oral opinion in open court['] costs to be taxed against the appellant Judgment Entered 4-25-80—Clerk
05-13-80	55	Filed pltf's affirmation and notice of motion for an order pursuant to rule adjudging Blum in contempt of court's Judgment of 12-26-79, Order of and Amendment to the Final Judgment and Order, dated 2-2-80. ret. 5-23-80
05-13-80	56	Filed pltfs memorandum in support of above motion that deft. Blum be held in [contempt]
05-19-80	57	Filed true copy of USCA for the Second Circuit Order that the judgment of District Court is reversed and remanded for consideration of whether the [. . .]deft-appellee is liable to the named pltf. for retroactive benefits in light [of] the Eleventh Amendment m/n
05-21-80	58	Filed deft. Blum affdvt[.] in opposition to pltf's motion to adjudge deft. Blum in contempt.
05-51-80	59	Filed deft Blum's memorandum of law in opposition to pltf's [contempt] motion
05-28-80	60	Filed pltf's affdvt[.] dated 5-23-80 in re to pltf's motion to adjudge deft. in contempt of court

District Court Docket Entries

DATE	NR.	PROCEEDINGS
06-17-80	61	Filed true copy of USCA for the Second Circuit ORDER, that the motion for Blum to recall mandate of this court and to stay [paragraphs] "11" and "12" of the final judgment of the District Court pending application to the Supreme Court of the United States for a writ of certiorari m/n
06-18-80	—	Filed memo. end. on document # 55 pltf's motion to hold Blum in [contempt] of Court deft failed to comply with the judgment of the Court when no stay was in effect in view of the stay granted on 6-11-80 the motion is denied—Sweet, J. m/n
12-01-80	63	Filed pltfs-Appellees affdvt. and notice of motion for an order pursuant to Rule 54 awarding pltfs attys fees and for other relief ret. 12-12-80
12-01-80	64	Filed pltfs memorandum in support of above motion to establish [attys] fees
12-02-80	65	Filed pltfs affdvt. and notice of motion for an order pursuant to rule 70 adjudging deft. Blum in contempt of this Court's Final Judgment of 12-20-79, Order of 1-4-80 and [Amendment] to the Final Judgment and Order dated 2-2-80. ret. 12-12-80
12-02-80	66	Filed pltfs memorandum in support of above motion to hold deft. Blum in contempt
12-29-80	(67)	Filed deft Blum's Memorandum of Law in opposition to pltff's motion for attorneys' fees orig to chambers
01-14-81	68	Filed stip. and order pltfs motion to adjudge deft. B. Blum in [contempt,] is withdrawn according to terms and conditions herein—Sweet, J.

District Court Docket Entries

DATE	NR.	PROCEEDINGS
01-15-81	69	Filed pltfs Supplemental affdvt. in support of pltf's motion to Establish the Amount of Atty's fees
01-15-81	70	Filed pltfs Reply memorandum in support of their motion to establish the amount of Atty's fees
04-02-81	71	Filed OPINION # 51421 In this, the final installment in this difficult litigation attorneys for the pltf. class seek an award of $118,968 as payment for their services in connection with their conduct of this action. Motion granted. [Pltfs] request a bonus [of] 50% of the lodestar amount. Particularly in view of the complexity of the litigation and the benefit to the class, I find such an award appropriate. Pltf is entitled to an award equal to the lodestar figure plus the bonus awarded, for $118,968. Submit judgment on notice within ten (10) days—Sweet, J. m/n
05-11-81	73	Filed pltf's notice of appeal to the USCA for the Second Circuit from the Order and Judgment dated 4-10-81, entered 4-13-81. mailed copy to Arthur Fried, Thomas Warren and Henry Adler
04-13-81	74	Filed ORDER and JUDGMENT # 81,0498 ORDERED that deft. Barbara Blum, as Commissioner of the New York State Department of Social Services pay to the Legal Aid Society of New York, counsel to pltfs herein attys fees in the amount of $118,968.00 plus interest—Sweet, J. Judgment Entered m/n ent. 5-21-81

District Court Docket Entries

DATE	NR.	PROCEEDINGS
08-08-81	76	Filed stip. and order to supplement transmitted record on Appeal [docketed] as 81-7385 1. Stip. and order to insure that pltf./intervenors Michael Murtagh and Dorothy Wilson do not suffer any harm (unsigned by the court) 2. Notice of settlement dated Sept. 28, 1979 3. [Unsigned] Order and Final Judgment with exhibits "A", "B", and "C" [annexed] thereto.
11-19-81	80	Filed true copy of USCA for the Second Circuit Ordered that the Order of the District Court is affirmed and the [Appellant's] claim that the award of fees in the amount of $118,968 etc. and further indicated—Judgment [entered] 11-19-81 m/n
04-29-82	81	Filed pltf's declaration and notice of motion for an order pursuant to rule awarding the Legal Aid Society Attys fees pursuant to 42 USC [1988] ret. 5-14-82.
05-12-82	82	Filed deft. Blum Memorandum of law in opposition to pltf's motion for Atty's fees [for] service performed in connection with deft [Blum's] appeal of the prior fee award in this case. orig. to chambers
05-26-82	83	Filed declaration of Arthur J. Fried for pltf. in support of the application of the attys for the pltf. class for an award of a reasonable atty's fee
05-26-82	84	Filed pltfs Memorandum of law in support of their application for fees [. . .]

District Court Docket Entries

DATE	NR.	PROCEEDINGS
05-26-82	85	Filed deft Blum's Reply Memorandum of law in opposition to pltf's counsels motion for attys fees for services performed in connection with deft Appeal of the prior fee award in this case. orig. to chambers
09-16-82	86	Filed OPINION # 53616 Pltf class [seeks] an award of atty's fees. Motion granted pltfs are entitled to an award of fees for time expended in connection with Blum's appeal of the prior award in this case and that the rate of [payment] requested and the hours expended by pltfs counsel are [reasonable] and that pltffs attys are entitled to an award of $16,419.80 Submit judgment on notice— Sweet, J.
10-13-82	87	Filed ORDER and JUDGMENT # 82, 1375 Ordered that deft. Arthur Y. Webb pay to the Legal [Aid] Society of New York, counsel to pltffs, attys fees in the amount of $16,419.80 —Sweet, J. m/n
11-01-82	88	Filed State defts [notice] of appeal to the USCA for the Second Circuit from Order and Judgment entered 10-13-82, mailed copy to Arthur Fried, Thomas Warren and Henry Adler.
01-12-83	89	Filed true copy of stip. and order of the UCSA for the Second Circuit withdrawing the appeal without costs and fees m/n
5-18-81		Copies of notice of appeal and district court docket entri[es on] behalf of [deft.] Blum filed.

Relevant Docket Entries in the United States Court of Appeals for the Second Circuit

ELLEN STENSON v. BARBARA BLUM, *et al.*
81-7385

DATE	FILINGS—PROCEEDINGS
5-18-81	Copies of notice of appeal and district court docket entries on behalf of Blum filed.
6-18-81	Record on appeal filed
7-30-81	Appellant Blum brief w/pfs filed.
7-30-81	Appellant Blum appendices w/pfs filed.
8-17-81	Supplemental record on appeal filed.
9-21-81	Appellee Stenson brief w/pfs filed.
9-21-81	Appellee Stenson addendum filed.
9-25-81	Appellant Blum reply briefs, pfs filed
10-16-81	Case argued before: Kaufman, Oakes, Kearse, CJJ
10-19-81	Judgment affirmed by detailed court order without opinion
11-10-81	Mandate (Judgment) filed.
2/1/82	Copy of notice of filing petition for writ of certiorari in U.S. Supreme Court filed—

Complaint

CLASS ACTION

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 78 Civ. 6044 (RWS)

ELLEN STENSON, individually and on behalf of all other persons similarly situated,

Plaintiff,

against

BARBARA BLUM, individually and in her capacity as Commissioner of the New York State Department of Social Services, BLANCHE BERNSTEIN, individually and in her capacity as Commissioner of the New York City Department of Social Services, and JOSEPH CALIFANO, Secretary of the Department of Health, Education and Welfare, individually and as Secretary,

Defendants.

PRELIMINARY STATEMENT

1. This is a class action primarily for declaratory and injunctive relief pursuant to 28 USC §§2201 and 2202, 42 USC §1983, and Rules 23, 54, 57 and 65 of the Federal Rules of Civil Procedure to protect rights secured by the Fifth Amendment and by the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and by the Social Security Act, §§1901 *et seq.*, 42 USC §§1396 *et seq.* and regulations promulgated pur-

suant thereto by the United States Department of Health, Education and Welfare.

2. By this action, the plaintiff, on behalf of herself and all others similarly situated, seeks a judgment declaring unconstitutional as violative of the Fifth and Fourteenth Amendments to the United States Constitution and as invalid under the Social Security Act, the defendants' practice of (a) automatically discontinuing Medicaid benefits to individuals found no longer eligible for SSI without making a determination as to the eligibility of those individuals for Medicaid benefits; (b) terminating Medicaid benefits to individuals found no longer eligible for SSI without timely and adequate notice of the termination and without providing a pretermination hearing at which defendants must establish and the recipient may contest the grounds for termination of benefits.

3. By this action plaintiff seeks, on behalf of herself and all others similarly situated, a preliminary and permanent injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure requiring defendants, their officers, agents, servants, employees and successors in office to restore Medicaid benefits to named plaintiff and members of her class until such time as defendants determine the eligibility for Medicaid of class members on an individual basis and until such time as class members are given timely and adequate notice of the proposed termination of their Medicaid benefits and given the opportunity to have a pretermination evidentiary hearing at which defendants must establish and recipients may contest the grounds for termination.

4. By this proceeding plaintiff also seeks a temporary restraining order requiring defendants to provide her with

Medicaid benefits pending a determination of her motion for a preliminary injunction and class certification.

5. Declaratory and injunctive relief are necessary and appropriate since plaintiff and the plaintiff class members will otherwise suffer irreparable harm for which there is no adequate remedy at law.

6. By this proceeding the named plaintiff also seeks monetary damages, compensatory and punitive, from defendants for malicious, and illegal wrongful action taken by them in violation of the named plaintiff's rights under the United States Constitution and the Social Security Act.

JURISDICTION

7. Jurisdiction over this suit is conferred upon this Court by 28 USC §1343(3) as an action to redress the deprivation by state and local defendants, under color of state law, of rights, privileges and immunities secured by the United States Constitution, and by 27 [sic] USC §1331 as a controversy with state and local defendants arising under the Constitution and laws of the United States, the amount in controversy being in excess of $10,000, exclusive of interest and costs. Jurisdiction is also conferred upon this Court by 27 [sic] USC §1331 as a controversy with the federal defendant arising under the Constitution and laws of the United States and by 28 USC §1361 as an action to mandate the federal defendant to perform a constitutional and statutory duty owed to the plaintiff.

CLASS ACTION ALLEGATIONS

8. Plaintiff brings this action as a class action pursuant to Rule 23(a) and, in addition Rule 23(b)(2) or, in the alternative, Rule 23(b)(1)(A) or (B) of the Federal Rules of Civil Procedure.

9. The plaintiff class is composed of all New York State residents who have received or who are receiving Medicaid benefits as recipients of SSI benefits, but whose Medicaid benefits were or are automatically terminated upon a determination of ineligibility for SSI without defendants having determined their eligibility for Medicaid coverage independent of SSI and/or provided timely and adequate notice of the termination and an opportunity for a pretermination hearing at which defendants must establish and the recipients may contest the grounds for termination of their Medicaid benefits.

10. This class action is properly brought pursuant to Rule 23 because (a) the class is so numerous that joinder of all members is impracticable; (b) there are questions of law and fact common to the class, namely, whether (1) the automatic termination of Medicaid benefits upon the termination of SSI benefits without a finding that a recipient is not eligible for Medicaid and/or (2) the failure to provide timely and adequate notice of the termination of Medicaid benefits and the right to a pretermination hearing violate the Fifth and Fourteenth Amendments to the Constitution and provisions of the Social Security Act and the regulations enacted pursuant thereto; (c) the claims of the representative plaintiff are typical of the claims of the members of the class; (d) the plaintiff's attorneys have legal resources and experience adequate to protect all members of the class, and the plaintiff will fairly and adequately protect the interests of the class; (e) the defendants, in terminating Medicaid benefits to plaintiff and her class without making a factual determination as to eligibility for Medicaid benefits and/or without providing timely and adequate notice of the termination and a pretermination hearing, have acted and have refused to act on grounds generally applicable to the class, thereby making appropriate final

injunctive relief and corresponding declaratory relief with respect to the class as a whole; (f) the prosecution of separate actions by individual members of the class would create a risk of varying adjudications with respect to individual members of the class which might establish incompatible standards of conduct for the defendants in this action, and would create a risk of adjudications with respect to individual members of the class that as a practical matter would be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

STATUTORY AND REGULATORY SCHEME

11. The Department of Health, Education and Welfare is authorized to make payments under the Medicaid program to states providing medical assistance in accordance with a state plan that conforms to the specific requirements of the Social Security Act. 42 USC §§1396 *et seq.*

12. The federal Medicaid program establishes a unitary Medicaid system which provides medical assistance to families with dependent children and to aged, blind or disabled individuals whose income is insufficient to meet their medical needs. 42 USC §1396(a)(10).

13. New York State has a plan and program for medical assistance for which it receives federal funding under the Medicaid program. Social Services Law §§363 *et seq.*

14. Subject to the supervision of the New York State Department of Social Services, local welfare departments are responsible for providing medical assistance to eligible persons residing within the territory of the local department. Social Services Law §365(1).

15. In conformance with the Social Security Act, New York State has established a Medicaid system, utilizing a uniform set of eligibility criteria, to provide benefits to:

(1) individuals eligible for or receiving home relief or aid to dependent children.

(2) individuals eligible for or receiving SSI benefits.

(3) certain children receiving care away from their own home.

(4) certain individuals receiving care in connection with the birth of an out-of-wedlock child.

(5) individuals who would be eligible for Aid to Dependent Children or for SSI but for income or resource levels. Social Services Law §366.

16. In order for a State to participate in the Medicaid program, its medical assistance plan must provide for periodic reconsideration or redetermination of eligibility for Medicaid and must provide for reconsideration or redetermination promptly upon receipt of a report that an individual's circumstances have changed so as to possibly affect eligibility for Medicaid. 45 CFR 206.10(a)(9).

17. New York State's plan provides for recertification of individuals covered by Medicaid. Social Services Law §366-a(6).

18. The State plan must also provide that no adverse action affecting an individual's Medicaid eligibility may be taken without affording that individual an opportunity for a fair hearing. 42 USC §1396(a)(3) and (8).

19. New York State's medical assistance plan (Medicaid) provides for a fair hearing in cases of Medicaid reduction or termination. 18 NYCRR §358.4(a).

20. A state plan must also provide for timely and adequate notice of adverse action in connection with an individual's Medicaid benefits. 45 CFR 205.10(a)(4) and (5).

21. New York State's medical assistance plan provides for timely and adequate notice to a Medicaid recipient. 18 NYCRR §358.8.

22. A state plan must also provide for Medicaid benefits to continue pending a fair hearing decision if a request for a hearing is made within the timely notice period. 45 CFR §205.10(a)(6)(i).

23. New York State's medical assistance plan provides for aid continuing when a Medicaid recipient makes a timely request for a hearing. 18 NYCRR §358.8(c)(1).

24. Although administration of the Medicaid program is the responsibility of the State, the Secretary of Health, Education and Welfare determines the Medicaid eligibility of New York State SSI recipients. The Secretary is authorized to enter into an agreement with a state to assume this function by 42 USCA §1383c and 20 CFR §416.2116(a) and (b). The New York State Commissioner of the Department of Social Services may enter into such an agreement with the Secretary pursuant to Social Services Law §363-b.

25. Federal regulations provide that under any agreement between the Secretary and a state for federal determination of Medicaid eligibility of SSI recipients, the state remains responsible for any function not specifically undertaken by the Secretary and the state must retain responsibility for a number of functions including the issuance, control and termination of medical assistance identification cards and other notices to individuals within the purview of the agreement. 20 CFR §416.2107(d).

26. Under the present agreement between the federal defendant and the state defendants, or under the policy and practice of defendants pursuant to such an agreement, plaintiff and her class members are being deprived of each and every one of the rights specified in paragraph 16 through 26 *supra*. Ensuring that plaintiff and her class are provided with those rights, pursuant to an agreement whereby there is a split in administrative functions between the federal, state and local defendants, is the responsibility of either the state and local defendants or the federal defendant or of all the defendants herein.

DEFENDANTS

27. Defendant BARBARA BLUM is sued individually and as Commissioner of the New York State Department of Social Services. She is responsible for the administration of the public assistance program throughout the State of New York. She has an office at 2 World Trade Center, New York, New York.

28. Defendant BLANCHE BERNSTEIN is sued individually and as Commissioner of the New York City Department of Social Services. She is charged with the responsibility for administering the public assistance program in the City of New York. Her office is at 250 Church Street, New York, New York.

29. Defendant JOSEPH CALIFANO is sued individually and as Secretary of the United States Department of Health, Education and Welfare. He is charged with administering the federal SSI and Medicaid programs. His office is located in Washington, D.C.

PLAINTIFF

30. Plaintiff ELLEN STENSON is a 77 year old widow living alone at 131 Jersey Street, Staten Island, New York.

31. Her only sources of income are Social Security payments of $220 per month and a pension of $107 per month.

33. Mrs. Stenson has a heart condition, asthma, a chronic bronchial condition, a hernia and suffers from painful arthritis. She stays in bed most of the day, and rarely leaves her home. When she has to go to the doctor, she goes by cab and then only in the company of her housekeeper.

34. Mrs. Stenson is cared for by a housekeeper, DOROTHY GRANBERG, who is paid by Medicaid funds through a vendor agency, The Staten Island Community Corporation. Mrs. Granberg cares for Mrs. Stenson three days a week for four hours each day. She purchases food and other necessities, helps Mrs. Stenson bathe and change her clothing, cleans her home and does her laundry. She also purchases and monitors Mrs. Stenson's medication. In November 1978 Mrs. Stenson's doctor determined that she needs such assistance on a daily basis.

35. Mrs. Stenson was covered by the Medicaid program when she applied for and became eligible for Supplemental Security Income benefits. (SSI)

36. Mrs. Stenson received a notice dated July 3, 1978 from the Department of Health, Education and Welfare stating that her SSI benefits were being terminated because of a change in her income. The notice did not say that her

Medicaid benefits were also being terminated, but merely stated:

> FOR INFORMATION ABOUT ANY CHANGE IN YOUR MEDICAID ELIGIBILITY CAUSED BY THIS ACTION YOU SHOULD GET IN TOUCH WITH YOUR LOCAL SOCIAL SERVICES AGENCY. (Exhibit A)

37. Mrs. Stenson did not dispute the SSI termination and had no reason to believe the termination affected her Medicaid coverage since she continued to receive a Medicaid card through October 1978.

38. In November 1978 Mrs. Stenson did not receive a Medicaid card. Because it was necessary to have prescriptions filled, Mrs. Granberg called the New York City Department of Social Services and the Social Security Administration on Mrs. Stenson's behalf to inquire about the Medicaid card.

39. She was advised by both agencies that the Medicaid card did not arrive because Mrs. Stenson's Medicaid coverage ceased when her SSI payments were terminated.

40. The person Mrs. Granberg contacted at the New York City Department of Social Services was Ms. St. Julio, Mrs. Stenson's caseworker. Ms. St. Julio advised Mrs. Granberg that a new Medicaid application would have to be filled out. Ms. St. Julio had periodically recertified Mrs. Stenson for housekeeping services, but was unable to complete the recertification in November until Mrs. Stenson had a currently valid Medicaid card.

41. Ms. St. Julio went to Mrs. Stenson's home on two occasions in November but a Medicaid application was not

completed. Mrs. Granberg was advised that the Social Security Administration was slow in forwarding information about Mrs. Stenson's income, and that it would be necessary to get a letter from Mrs. Stenson's bank indicating the amounts deposited each month. In addition, Ms. St. Julio needed a xerox copy of Mrs. Stenson's bankbook and her social security card. Mrs. Granberg collected this information for Ms. St. Julio. Ms. St. Julio also required a copy of Mrs. Stenson's husband's death certificate. She was advised that the original of the death certificate had been placed in the hands of Mrs. Stenson's doctor, who had since died. Mrs. Granberg contacted the [sic] The Legal Aid Society to see whether the certificate could be obtained from the doctor's successor. In a conversation on December 8, 1978 with Mrs. Stenson's attorney at The Legal Aid Society, Ms. St. Julio conceded that the application could be processed without the death certificate.

42. Ms. St. Julio was unable to recertify Mrs. Stenson's housekeeping services until the Medicaid application was processed. As a result, payments to Mrs. Granberg for her services were stopped by the Staten Island Community Corporation on December 8, 1978.

43. Ms. St. Julio advised Ann Moynihan of The Legal Aid Society on December 8, 1978 that there was no mechanism by which Mrs. Stenson could be given an emergency Medicaid card to cover housekeeping services pending a decision on her application.

44. Even though payments for housekeeping services were stopped on December 8, 1978, Mrs. Granberg cared for Mrs. Stenson on December 11 and December 13, 1978 because she was concerned about Mrs. Stenson's well-being if she left her alone. In continuing to care for Mrs. Stenson,

Mrs. Granberg turned down another employment opportunity with the vendor agency. She receives $67 every two weeks for the services she provides to Mrs. Stenson. On December 12, 1978, Mrs. Stenson had to pay $61.70 to her pharmacist for medication provided in November and December while she was without Medicaid coverage.

45. As a result of the termination of her Medicaid benefits, plaintiff has suffered great emotional distress at the thought of being left alone and unable to care for herself, she has also been distressed by the knowledge that even if her Medicaid is restored she will have lost the care and companionship of Dorothy Granberg because Mrs. Granberg may have to accept another job through the vendor agency. In addition she has been placed in fear by the knowledge that she may have to give up her apartment and her belongings and move into a nursing home. As a result of this emotional distress, Mrs. Stenson has been damaged in the amount of $10,000.00. Mrs. Stenson has already incurred costs of $61.70 for medicine and $32.50 for Mrs. Granberg's services and she will soon need to see her doctor for her monthly medical examination. Her expenses will therefore continue to mount as long as she is not covered by Medicaid, and she seeks recovery of these expenses from defendants. Mrs. Stenson also seeks punitive damages in the amount of $5,000.00 because defendants' failure to provide her with timely and adequate notice of the proposed termination of her Medicaid benefits and their failure to provide her with an opportunity for a pretermination hearing was a willful and malicious deprivation of her clearly established statutory and constitutional rights and such was done in gross disregard for those rights.

46. At all times since July 1978 Mrs. Stenson has been eligible for Medicaid under §336b(5) of New York State

Social Services Law in that her monthly medical expenses of approximately $190.00 reduces her monthly income to $137, well below the [M]edicaid income eligibility levels.

47. Mrs. Stenson was never advised that a determination was made on her Medicaid eligibility and was never advised of her right to have a fair hearing prior to the termination.

48. In conversations with counsel for Mrs. Stenson on December 8, 1978, employees of the Social Security Administration, the New York State Department of Social Services and the New York City Department of Social Services stated that they had no knowledge of notices being sent to Medicaid recipients who had been terminated from SSI prior to the termination of Medicaid benefits.

STATEMENT OF CLAIMS

49. Defendants' policy and practice of terminating Medicaid benefits of SSI recipients automatically upon cessation of those recipients' SSI benefits without making a factual determination as to Medicaid eligibility independent of SSI eligibility and/or without providing timely and adequate notice of a proposed termination of Medicaid benefits and the opportunity for a pretermination hearing at which defendants must establish and recipients may contest the grounds for termination violate the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment in that defendants by their actions deny recipients a meaningful opportunity to be heard.

50. Defendants' policy and practice of terminating Medicaid benefits of SSI recipients automatically upon cessation of those recipients' SSI benefits without making a factual

determination as to Medicaid eligibility independent of SSI eligibility and/or without providing timely and adequate notice of a proposed termination of Medicaid benefits and the opportunity for a pretermination hearing at which defendants must establish and recipients may contest the grounds for termination are unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amendment in that said policy and practice arbitrarily discriminate against recipients of Medicaid whose initial eligibility was determined along with eligibility for SSI benefits in that it denies them alone the procedural rights which all other [M]edicaid recipients are given, including the right to continue to receive benefits until proven ineligible on the basis of a factual determination and of notice of the right to continuing Medicaid pending their fair hearing decisions if the fair hearing is requested within the timely notice period.

51. Defendants' policy and practice of terminating Medicaid benefits of SSI recipients automatically upon cessation of those recipients' SSI benefits without making a factual determination as to Medicaid eligibility independent of SSI eligibility and/or without providing timely and adequate notice of a proposed termination of Medicaid benefits and the opportunity for a pretermination hearing at which defendants must establish and recipients may contest the grounds for termination violate the Social Security Act, 42 U.S.C. [§]1396 *et seq.*, and the regulations enacted pursuant thereto, specifically 42 CFR [§]206.10(a)(9), 45 CFR [§]205.10(a)(4) and (5), and 20 CFR [§]416.2107(d).

52. Defendants' policy and practice of terminating Medicaid benefits of SSI recipients automatically upon cessation of those recipients' SSI benefits without making a factual determination as to Medicaid eligibility independent of SSI eligibility and/or without providing timely and adequate

notice of a proposed termination of Medicaid benefits and the opportunity for a pretermination hearing at which defendants must establish and recipients may contest the grounds for the proposed termination have injured plaintiff, entitling her to special damages in the amount of $5,100.00 damages for mental distress and anguish in the amount of $5,000.00 and punitive damages in the amount of [$]5,000 for defendants' willful, malicious and gross disregard of plaintiff's rights under the Constitution and the Social Security Act and regulations enacted pursuant thereto.

RELIEF REQUESTED

WHEREFORE, plaintiff, on behalf of herself and on behalf of all others similarly situated, respectfully prays that this Court:

1. Assume jurisdiction over this action pursuant to 28 USC §1343, 28 USC §1331 and 28 USC §1361.

2. Pursuant to Rule 65 of the Federal Rules of Civil Procedure, issue a temporary restraining order pending the hearing and determination of plaintiff's motion for class certification and a preliminary injunction requiring defendants to restore Medicaid benefits to plaintiff.

3. Determine pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, that this action be maintained as a class action.

4. Pursuant to Rule 65 of the Federal Rules of Civil Procedure, issue a preliminary injunction, pending a final determination of this action, requiring defendants, their officers, agents, servants, employees and successors in office to restore Medicaid benefits to named plaintiff and members of her class until such time as defendants determine the

eligibility for Medicaid of class members on an individual basis and until such time as class members are given timely and adequate notice of the proposed termination of their Medicaid benefits and given the opportunity to have a pretermination evidentiary hearing at which defendants must establish and recipients may contest the grounds for termination.

5. Enter a judgment declaring unconstitutional or violative of the Fifth and Fourteenth Amendment to the Constitution, and as invalid under the Social Security Act and the regulations adopted pursuant thereto defendants' policy and practice of terminating Medicaid benefits of SSI recipients automatically upon cessation of those recipients' SSI benefits without making a factual determination as to Medicaid eligibility independent of SSI eligibility and/or without providing timely and adequate notice of a proposed termination of Medicaid benefits and the opportunity for a pretermination hearing at which defendants must establish and recipients may contest the grounds for termination.

6. Pursuant to 28 USC [§]2202, 42 USC §1983 and Rule 65 of the Federal Rules of [Civil] Procedure, enter a permanent injunction enjoining and restraining the defendants and their officers, agents, servants, employees and successors in office from automatically terminating the Medicaid benefits of SSI recipients who have been determined ineligible for SSI without first making a factual determination of eligibility for Medicaid independent of eligibility for SSI and/or without first providing timely and adequate notice of the proposed termination of Medicaid benefits and an opportunity for a [. . .] pretermination fair hearing at which defendants must establish and recipients may contest the grounds for the determination.

7. Pursuant to 42 USC §1983 and Rule 54 of the Federal Rules of Civil Procedure, enter a judgment for damages in the amount of $15,000.00 on behalf of plaintiff.

8. Pursuant to Rule 43(d) of the Federal Rules of Civil Procedure and the Civil Rights Attorney's Fee Award Act of 1976, 42 USC §1988, allow plaintiffs reasonable attorneys' fees and their costs and disbursements herein, and also grant them and the members of the plaintiff class such additional and further relief which to this Court seems just and proper.

Dated: Richmond, New York
December 14, 1978.

YOURS & [ETC.]

KALMAN FINKEL, ESQ.
Attorney-in-Charge
Civil Division
JOAN MANGONES, ESQ.
Attorney-in-Charge
The Legal Aid Society
Staten Island Neighborhood Office
42 Richmond Terrace
Staten Island, New York 10301
(212) 273-6677

/s/ MARSHALL GREEN

MARSHALL GREEN, of Counsel
JOHN E. KIRKLIN, ESQ.
Director of Litigation
The Legal Aid Society
Civil Appeals & Law Reform Unit
11 Park Place—8th Floor
New York, New York 10007
(212) 227-2755
CONSTANCE P. CARDEN,
ARTHUR FRIED, of Counsel

Exhibit A Annexed to Complaint

SUPPLEMENTAL SECURITY INCOME
NOTICE OF PLANNED ACTION

From: Department of Health, Education, and Welfare
Social Security Administration

ELLEN STENSON
131 JERSEY ST
APT 2G
STATEN ISLAND NY 10301

Date: 07-03-78
Social Security Number:
SSI 305-12-3652 AI CAA
SSI SSA 055-09-0473

YOUR CHECK WILL STOP IN AUGUST 1978.

THE AMOUNT OF YOUR INCOME AFFECTS THE AMOUNT OF YOUR CHECK. BECAUSE YOUR INCOME HAS CHANGED, WE HAVE REFIGURED THE AMOUNT OF PAYMENT DUE YOU.

ALTHOUGH SUPPLEMENTAL SECURITY INCOME PAYMENTS ARE MADE MONTHLY, WE AVERAGE YOUR INCOME OVER A CALENDAR QUARTER IN FIGURING THE AMOUNT OF YOUR PAYMENT. WE FIND THAT FOR THE CALENDAR QUARTER JULY 1978 THROUGH SEPTEMBER 1978 YOUR AVERAGE MONTHLY INCOME IS $346.70.

YOUR AVERAGE MONTHLY INCOME IS BASED ON YOUR INCOME FOR THE CALENDAR QUARTER AS FOLLOWS,

Exhibit A Annexed to Complaint

YOUR SOCIAL SECURITY BENEFIT, BEFORE ANY DEDUCTION FOR MEDICARE MEDICAL INSURANCE PREMIUMS, OF $220.70.

YOUR CIVIL SERVICE ANNUITY OF $126.00.

FOR INFORMATION ABOUT ANY CHANGE IN YOUR MEDICAID ELIGIBILITY CAUSED BY THIS ACTION YOU SHOULD GET IN TOUCH WITH YOUR LOCAL SOCIAL SERVICES AGENCY.

IF AT ANY TIME IN THE FUTURE YOU THINK PAYMENT MAY BE DUE YOU, PLEASE CONTACT US IMMEDIATELY. IF YOU ARE NOT ELIGIBLE TO RECEIVE PAYMENT DURING A MONTH BEFORE JULY 1979, YOU WILL HAVE TO FILE A NEW APPLICATION TO RECEIVE PAYMENT. SINCE WE CANNOT MAKE PAYMENT FOR A MONTH BEFORE THE MONTH IN WHICH AN APPLICATION IS FILED, A DELAY IN APPLYING WOULD RESULT IN A LOSS OF PAYMENT FOR MONTHS BEFORE THE APPLICATION IS FILED.

ALTHOUGH WE PLAN TO TAKE THE ACTION SHOWN ABOVE, YOU MAY HAVE YOUR CURRENT PAYMENT CONTINUED OR REINSTATED IF YOU REQUEST AN APPEAL WITHIN 10 DAYS OF RECEIVING THIS NOTICE.

Important: See other side for an explanation of your appeal rights and other information. →

Exhibit A Annexed to Complaint

Please get in touch with social security if:

You believe the decision shown on the other side of this notice is wrong, *or*

You have any questions or need more information.

Most questions can be handled by phoning or writing any social security office. If you visit a social security office, please bring this notice with you. If the decision in your case is based on incorrect information, we'll be happy to make whatever change is [necessary].

YOUR RIGHT TO APPEAL

If you still are not satisfied with the decision, you have the right to appeal. The first step in the appeals process is called reconsideration. You must request reconsideration in writing within 60 days from the date you receive this notice.

APPEAL WITHIN 10 DAYS IF YOU WANT THE PRIOR PAYMENT CONTINUED.

If you want your prior payment continued while we reconsider our decision, you must request reconsideration within 10 days of receiving this notice. If you ask for reconsideration within 10 days, we will continue or reinstate the prior payment until a reconsideration determination is made, no matter how long it takes. Depending on the outcome of the reconsideration, you may have to pay back any money you were not entitled to receive. For this reason, you may want to waive continuation or reinstatement of the prior payment; then, if you are successful on reconsideration, any money due you will be paid.

Exhibit A Annexed to Complaint

If you cannot send us a written request for reconsideration within the 10 and 60 day time limits, be sure to contact us by phone. If you wait longer than 10 days, we will not reinstate the prior payment unless you have a good reason for the delay. And, if you wait longer than 60 days and do not have a good reason for the delay, we will not reconsider our decision.

There are three different ways to present your case for reconsideration. If you request reconsideration, be sure to tell us which of these procedures you wish to be used in presenting your case. In each, reconsideration will be by a person who had nothing to do with the decision you are appealing. The three methods of reconsideration are:

1. Case Review. In a case review, you have the right to review the evidence relating to this decision and to submit any additional oral and written evidence you may have to any social security office.

2. Informal Conference. In addition to the rights you have in a case review, in the informal conference you also have the right to present your case to the person who will decide it, to have witnesses testify for you, and to have a summary record kept of the oral and written evidence presented.

3. Formal Conference. In the formal conference you have, in addition to the rights you have in a case review and an informal conference, the right to request that we subpoena unwilling witnesses to appear for cross-examination and to bring with them any evidence about your case.

In having your case reconsidered, you can represent yourself or be represented by a lawyer, a friend, or any other person. Contact your social security office for names of organizations that can help you.

Stipulation and Order Granting TRO to Named Plaintiff

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

78 CIV. 6044 (RWS)

ELLEN STENSON,

Plaintiff

against

BARBARA BLUM, *et al.*,

Defendants.

IT IS HEREBY STIPULATED and agreed by and between the attorneys for the respective parties that, notwithstanding the merits of the law suit and to insure that the named plaintiff does not suffer any harm or injury while the merits of this suit are being argued and determined:

1. The New York City Department of Social Services, The New York State Department of Social Services and The Department of Health, Education and Welfare, agree to provide plaintiff with interim Medicaid benefits until the hearing and determination of plaintiff's motion for a preliminary injunction.

2. In the event that The New York City Department of Social Services determines that plaintiff is no longer eligible for interim Medicaid benefits, as provided in paragraph (1), defendants may, in accordance with their procedures, terminate plaintiff from

the Medicaid program upon proper notice, which shall include the right to a fair hearing and aid continuing. A copy of said notice shall be sent to attorney for plaintiff.

3. Plaintiff's application for an Order to Show Cause shall be considered as a motion for class certification and a preliminary injunction returnable at 2 P.M. on Febr ry 16, 1979.

4. The time of defendant HEW to move or answer with respect to the complaint shall expire on February 16, 1979.

JOAN MANGONES, ESQ.
The Legal Aid Society
Attorneys for Plaintiff

By /s/ MARSHALL GREEN

MARSHALL GREEN
(212) 273-6677

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendant Blum
in her official capacity as
Commissioner

By /s/ MARION BUCHBINDER

MARION BUCHBINDER
Assistant Attorney General
(212) 488-3023

HENRY ADLER, ESQ.
Attorney, New York City
Department of Social Services
Attorney for Defendant Bernstein
as Commissioner of Dept. of Social
Services

/s/ HENRY ADLER

433-4540

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for Defendant Califano
in his official capacity as
Secretary of HEW

By /s/ THOMAS D. WARREN

THOMAS D. WARREN
Assistant U.S. Attorney
791-1959

SO ORDERED
/s/ ROBERT W. SWEET

U.S.D.J.

December 27, 1978

Plaintiff's Order to Show Cause for a Preliminary Injunction, for Class Certification and a Temporary Restraining Order for Named Plaintiff

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

Upon the annexed complant, memorandum of law and affidavits, it is

ORDERED, that the defendants or their attorneys show cause before this Court in Room in the United States Courthouse, Foley Square, New York, New York, on the day of December, 1978, at 9:30 o'clock in the forenoon of that day or as soon thereafter as counsel may be heard, WHY an order should not be made:

1. Certifying the plaintiff class herein pursuant to Rule 23(c)(1) and Rule 23(a) and, in addition Rule 23(b)(2) or in the alternative Rule 23(B)(1)(A) or (b) of the Federal Rules of Civil Procedure; the class to be defined as all New York state residents who have received or who are receiving Medicaid benefits as recipients of SSI benefits, but whose Medicaid benefits were or are automatically terminated upon a determination that they are no longer entitled to SSI without either determining their eligibility for Medicaid coverage independent of SSI and/or providing timely and adequate notice of the termination and an opportunity for a pretermination hearing at which defendants must establish and the recipients may contest the grounds for termination of their Medicaid benefits.

2. Granting, pending the determination of this action a preliminary injunction pursuant to Rule 65 of the Federal Rule of Civil Procedure, requiring defendants, their officers, agents, servants, employees and successors in office to restore Medicaid benefits to named plaintiff and members of

her class until such time as defendants determine the eligibility for Medicaid of class members on an individual basis and until such time as class members are given timely and adequate notice of the proposed termination of their Medicaid benefits and given the opportunity to have a predetermination evidentiary hearing at which defendants must establish and recipients may contest the grounds for termination.

3. Granting, such other and further relief which as to this Court may seem just, equitable and proper.

ORDERED, pending the hearing and determination of the plaintiff's motion for class certification and preliminary injunction (1) that the defendants immediately restore named plaintiff's Medicaid benefits until defendants make a factual determination of named plaintiff's eligibility for Medicaid; and if the determination is negative, until such time as she is given timely and adequate notice of the proposed termination and a pretermination evidentiary hearing on her Medicaid eligibility; (2) that security for this application pursuant to Rule 65 is waived because of the poverty of the plaintiff.

Sufficient reason appearing therefor, it is FURTHER ORDERED, that personal service of a copy of this Order and the papers upon which it was granted, on the Attorney General of the State of New York, 2 World Trade Center, New York, New York; and on the Corporation Counsel of the City of New York, 1655 Municipal Building, New York, New York, and on the United States Attorney for the Southern District, One St. Andrews Plaza, New York, New York, on or before o'clock on the day of December, 1978, shall constitute sufficient service of this Order.

Dated: New York, New York
December , 1978.

United States District Judge

Affidavit of Ellen Stenson in Support of Temporary Restraining Order, Class Certification and a Preliminary Injunction

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

State of New York)
County of Richmond) ss.:

ELLEN STENSON, being duly sworn, deposes and says:

1. I am the named plaintiff in the above-entitled action and I make this affidavit in support of my motion for a temporary restraining order on my own behalf and in support of a motion for class certification and for a preliminary injunction on behalf of the class.

2. I am a seventy-seven year old widow living alone in apartment 2G in a public housing project located at 131 Jersey Street, Staten Island, New York.

3. My only sources of income are social security payments of $220 a month and a pension of $107 a month[.] I have no other assets or sources of income.

4. I have a heart condition and was hospitalized last year for a stroke. I suffer from asthma, a chronic bronchial condition, a hernia and constant, painful arthritis. Even with daily medication, which includes lanoxin, tandearil, lasix, enderal and nembutal, my condition is such that I cannot take care of myself without help. I cannot leave the house alone, and cannot bathe without assistance.

I also tend to be forgetful and need someone to take care of my medicine, my bills and other day to day tasks.

5. Until December 8, 1978, Dorothy Granberg of 21 Diehard Avenue, Staten Island, NY was my housekeeper. She took care of me on Monday, Wednesday and Friday each week from 9 am until 1 pm. I have been able to meet the costs of housekeeping services, doctors' bills and prescription costs because I had Medicaid coverage of these costs through October 1978. December 8, 1978 was the last day that Mrs. Granberg was paid for taking care of me because, I understand, my Medicaid payments were cut-off.

6. Mrs. Granberg came to take care of me on December 11, 1978, even though she was not paid for it because, as she told me, she was worried about what would happen to me if she didn't come. Mrs. Granberg cannot continue to care for me without payment because she needs money to care for her own family.

7. Mrs. Granberg told me that my doctor, Dr. Rohocynsky, has written a report, which was given to the New York City Department of Social Services, stating that I need a housekeeper on a daily basis due to my physical condition.

8. I was notified in July that my Supplemental Security Income payments were being stopped because of my income but did not know that my Medicaid was stopped until my Medicaid card didn't come. The notice I received about my SSI in July did not tell me my Medicaid benefits were being stopped. The notice simply said:

> FOR INFORMATION ABOUT ANY CHANGE IN YOUR MEDICAID ELIGIBILITY CAUSED BY THIS ACTION YOU SHOULD GET IN TOUCH WITH YOUR LOCAL SOCIAL SERVICES AGENCY. (Exhibit A)

9. I did not appeal from the termination of my Supplemental Security Income benefits in July 1978 because Social Security correctly computed my income.

10. Mrs. Granberg told me that she contacted Social Security when my Medicaid card didn't arrive in November, and she was told by the Social Security representative that my Medicaid was cut-off when my SSI was cut-off. Mrs. Granberg also contacted my case worker at the New York City Department of Social Services when my Medicaid card did not arrive in November. My caseworker, Mrs. St. Julio, told Mrs. Granberg that she would look into it, but that I would probably have to re-apply for Medicaid.

11. Thereafter Mrs. St. Julio came to my home on two occasions to get my new application for Medicaid filled out. I don't remember a lot of the information that is necessary for the application, and many of the documents Mrs. St. Julio says I need were left with my doctor in Manhattan, who has since died. My housekeeper has gathered together as much of the information as we can find and my lawyer tells me she spoke to Mrs. St. Julio on December 8, 1978 and Mrs. St. Julio said that the documents I need are a copy of my bankbook, a death certificate for my husband, my social security card and a statement about my monthly income from my bank. I have a copy of the bankbook and I know my social security number. My lawyer tells me that Mrs. St. Julio agreed that my husband's death certificate was not essential in order to process the application and that the only reason a letter from my bank was necessary was because Social Security had been slow in providing information about my income. Mrs. St. Julio did agree that the information in my file was probably sufficient without requiring a letter from the bank. I believe I have, at one point or another, supplied all these documents to either

the Social Security Administration or to the New York City Department of Social Services in connection with my application for SSI and in connection with recertification of my need for housekeeping services.

12. Mrs. Granberg told me that Dr. Miller, the pharmacist at the local drug store, gave her my medicine in November even though I did not have a Medicaid card, but that if Medicaid did not pay, I would have to.

13. I believe I am entitled to receive Medicaid even though I am no longer receiving Supplemental Security Income benefits because my income is only $346 per month and my medical expenses are at least $180 per month. My lawyer has advised me that, given my income and my medical expenses, I am eligible for Medicaid on a "spenddown" basis, whereby I pay a certain amount toward my medical bills each month and Medicaid pays for the rest.

14. If Mrs. Granberg can not take care of me, I will be unable to stay alone in my apartment, and my social worker at the New York City Department of Social Services said I may have to go into a nursing home.

15. I have needed somebody to take care of me since my husband died four years ago. I have been in the hospital and have been in foster care. I have been living in my present apartment for about two years, and with help have been able to manage. I cannot manage without help.

16. A move to a nursing home would cause me to lose my apartment and my belongings, and I don't want to go to one because I am afraid of what would happen to me there. I want Mrs. Granberg to continue taking care of me. She cares about me, keeps me company, and makes sure that my needs are taken care of.

17. The only reason that Mrs. Gransberg has to stop taking care of me is because my Medicaid was cut-off.

18. I was never notified that my Medicaid coverage was being terminated and was never informed that I had a right to have a hearing before my Medicaid benefits were cut-off.

19. I therefore ask this court to restore my benefits and to give me the relief asked for in the annexed order to show cause.

/s/ ELLEN STENSON

ELLEN STENSON

Sworn to before me this
11th day of December, 1978.

/s/ [ILLEGIBLE]
(Notary Public)

Affidavit of Dorothy Granberg in Support of Plaintiff's Motion for a Temporary Restraining Order, Class Certification and a Preliminary Injunction on Behalf of the Class

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

State of New York)
County of Richmond) ss.:

DOROTHY GRANBERG, being duly sworn, deposes and says:

1. I make this affidavit in support of ELLEN STENSON's motion for a temporary restraining order on her own behalf and for class certification and a preliminary injunction on behalf of the class.

2. I live at 21 Diehard Avenue, Staten Island, New York, and, until December 8, 1978, worked as housekeeper for ELLEN STENSON, the named plaintiff herein.

3. I have cared for Mrs. Stenson for approximately one year, and go to her home at 131 Jersey Street, Staten Island, New York, on Mondays, Wednesdays and Fridays from 9 a.m. until 1 p.m.

4. I am paid for these services by the Staten Island Community Corp., a vendor agency which is reimbursed by [M]edicaid funds. As I understand it, Mrs. Stenson's need for my services is recertified by The New York City Department of Social Services every six months so long as she remains covered by Medicaid.

5. Mrs. Stenson's last certification for housekeeping services ran out as of December 11, 1978, and I was in-

formed by a letter from the Staten Island Community Corp. that Friday, December 8, 1978 was the last day for which I would be paid.

6. Mrs. St. Julio of the New York City Department of Social Services is the person who handles the recertification of Mrs. Stenson's housekeeping services. I understand from [Mrs.] St. Julio that Mrs. Stenson has not been recertified from housekeeping services beyond December 11th because her [M]edicaid coverage has been terminated.

7. I first learned that Mrs. Stenson's [M]edicaid had been terminated when her Medicaid card for November 1978 did not arrive in the mail. Since Mrs. Stenson needed her prescriptions filled, I called Social Security to find out where her [M]edicaid card was. I was informed that Mrs. Stenson would probably not be receiving another Medicaid card because her Medicaid coverage ended when her Supplemental Security Income benefits were terminated.

8. After speaking to the person from Social Security, I then called Mrs. St. Julio, who is Mrs. Stenson's case worker at the New York City Department of Social Services. Mrs. St. Julio said that she would check into the matter and subsequently advised me that because Mrs. Stenson's SSI payments were stopped, her Medicaid benefits were also terminated. [Mrs.] St. Julio advised me that Mrs. Stenson would have to reapply for Medicaid before she could be recertified for housekeeping services.

9. Mrs. Stenson had received a notice dated July 3, 1978 from Social Security stating that her Supplemental Security Income benefits were being terminated. The notice did not say that her [M]edicaid benefits would also be cut off. Exhibit .

10. I open Mrs. Stenson's mail, and usually discuss with her any correspondence that she does not understand. I do not recall her receiving a notice from any governmental agency advising her that Medicaid benefits were being terminated.

11. Even though the last day for which I was paid for my services was December 8, 1978, I went in to care for Mrs. Stenson on December 11th because I could not in good conscience be responsible for leaving her alone in her apartment after she had been alone all weekend.

12. I have to work to support my family, but have held myself available to continue to care for Mrs. Stenson because the Legal Aid Society advised me on December 8, 1978 that they would go to court on Mrs. Stenson's behalf.

12. Mrs. Stenson has to have someone to care for her. She stays in bed all day except for short walks around the apartment. The only time she goes out is in my company when I take her to her doctor about once a month. There are months when she doesn't feel well enough even to go to the doctor. I have taken her to the Social Office on two occasions in the past year. When we go out we have to take a cab, as I cannot manage Mrs. Stenson on public transportation.

13. It is for these reasons that I have done all I can to get Mrs. Stenson back on Medicaid. When I learned in early November that she wouldn't get a card, arrangeme..ts were made for Mrs. St. Julio of the New York City Department of Social Services to come to the apartment to fill out a new Medicaid application. Mrs. Stenson did not have some of the original documents required by [Mrs.] St. Julio to process the application, and so her reapplication has been delayed. Some of the documents that Mrs. Stenson

has been asked for—i.e. her husband's death certificate, her social security card, and her marriage certificate, were given to Mrs. Stenson's doctor for safekeeping. The doctor is now dead, and the documents are probably in the hands of his successor. I have made efforts to obtain the documents, but I believe that all of these papers have, at one time or another, been given to either the Social Security [A]dministration or to the New York City Department of Social Services in connection with Mrs. Stenson's SSI application or in connection with her recertification for housekeeping services. I have done my best to collect the documentation in Mrs. Stenson's possession. However, as I explained to Mrs. St. Julio, I work as housekeeper for Mrs. Stenson for only twelve hours a week. There is a limit to the extra hours I can put in trying to obtain documentation, and I simply can't go running all over New York City tracking down original documents.

14. I have done everything I can to get Mrs. Stenson's Medicaid card back. I don't understand all of the rules governing the governmental benefits that Mrs. Stenson receives, and so it has taken me since early November to realize that we had to get legal help to attempt to solve the problem. I still do not know what I could have done to prevent Mrs. Stenson's [M]edicaid benefits from being cut off. Neither Mrs. Stenson nor I could have done anything more than we have done.

15. As part of the recertification process for housekeeping services that we have been going through with Mrs. St. Julio, I obtained a form from Dr. Rohocynsky stating that Mrs. Stenson needed housekeeping services on a daily basis. I did not keep a copy of the form, but it should be in Mrs. Stenson's files at the New York City Department of Social Services.

16. With someone to help her, Mrs. Stenson manages quite well, but there is simply no way that she can take care of herself without assistance. I bathe her, help her change her clothing, do her shopping, get her prescriptions filled, monitor her medication and mail. I clean her house and plan her meals.

17. When a contact with a government agency is necessary, I make the contact. Had I known that Mrs. Stenson's [M]edicaid was being cut off, and had I been advised as to how I could prevent the cut off, I would have done [m]y best to take appropriate action. As it is, we were never advised of the cut off and by the time we learned of it, it was evidently too late to do anything about it.

18. I believe that Mrs. Stenson will be seriously harmed if she doesn't get immediate [M]edicaid coverage so that her housekeeping services and medication can be restored.

/s/ DOROTHY GRANBERG

DOROTHY GRANBERG

[Jurat Omitted in Printing]

Affidavit of Ann Moynihan in Support of [Stenson] Order to Show Cause

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

State of New York)
County of Richmond) ss.:

ANN MOYNIHAN, being duly sworn, deposes and says:

1. I am an attorney duly admitted to practice in the courts of the State of New York, and am of counsel to JOAN MANGONES, ESQ., THE LEGAL AID SOCIETY, 42 Richmond Terrace Staten Island, New York, attorney for the named plaintiff ELLEN STENSON.

2. In a conversation on December 8, 1978 with ELLEN STENSON and her housekeeper, DOROTHY GRANBERG, I ascertained that Mrs. Stenson had been cut off Supplemental Security Income benefits in August 1978, and had received her last Medicaid card in October 1978. Neither Mrs. Stenson nor Mrs. Granberg recalled receiving any notice about the termination of Medicaid benefits.

3. I obtained a copy of the notice terminating Mrs. Stenson's SSI benefits from her file at the New York City Department of Social Services, and that notice is attached hereto as Exhibit A. The notice did not advise Mrs. Stenson that her Medicaid benefits were terminating with her SSI benefits nor did it provide her with a right to a pre-termination hearing in connection with her Medicaid benefits.

4. I called the office of the New York City Medicaid Director to determine what the practice of the New York City Department of Social Services is regarding Medicaid coverage when a recipient of SSI is notified that SSI benefits are being terminated. I was referred to Mr. Agin in the New York City Medicaid Fair Hearing office. Mr. Agin was unaware of any practice whereby the City of New York Department of Social Services notifies SSI recipients that their Medicaid coverage is being terminated along with their SSI coverage and was unaware of any notification that such individuals have a right to a pretermination hearing on Medicaid benefits. Mr. Agin suggested that any request for a fair hearing on such an issue would have to be made through the New York State Department of Social Services.

5. I then called the New York State Department of Social Services' Fair Hearing Section in Albany, New York, and asked a Mr. Schaeffer what the practice of the New York State Department of Social Services is when an SSI recipient's Medicaid benefits are being terminated. Mr. Schaeffer informed me that the local departments of social services might send out a notice that Medicaid benefits have been terminated, but that, to his knowledge, local departments did not send out a notice prior to the termination of benefits giving recipients an opportunity for a pretermination hearing. Mr. Schaffer advised me that to his knowledge the New York State Department of Social Services does not send out such a notice.

6. I again called the New York City Medicaid Director's office and was referred to Mr. Roselum who advised me that, to his knowledge, New York City did not send out notices prior to terminating SSI recipients' benefits. He recommended that I call the Social Security Administration.

7. I then spoke to a Social Security representative who advised me that if my client did not wish to challenge the termination of SSI benefits as such, there is no pretermination hearing provided by the Social Security Administration on the issue of a Medicaid termination.

8. After my conversation with Mrs. Stenson on December 8, 1978, I also called her doctor, Dr. Rohocynsky to ask him about Mrs. Stenson's need for housekeeper services. The doctor advised me over the telephone that Mrs. Stenson's medical condition was such that she required the daily assistance of a housekeeper, and that it was not possible for Mrs. Stenson to manage on her own.

9. I also spoke to Ms. St. Julio, Mrs. Stenson's caseworker at the New York City Department of Social Services on December 8, 1978. She advised me that the first she learned of Mrs. Stenson's Medicaid being terminated was when she was in touch with Mrs. Stenson about her housekeeper recertification in November. Ms. St. Julio advised me that she could not recertify Mrs. Stenson for housekeeping services without a currently valid Medicaid card. She also advised me that there was no mechanism available to provide Mrs. Stenson with housekeeper services on an emergency basis while her application for Medicaid was being processed.

10. Ms. St. Julio also advised me that she was going to process a Medicaid application on Mrs. Stenson's behalf. Ms. St. Julio advised me that she needed additional documentation for the application, specifically, a copy of her bankbook, a death certificate for her husband, her social security card and a statement about her monthly income from the bank. I advised Ms. St. Julio that Mrs. Stenson had a copy of the bankbook and knew her social security

number. Ms. St. Julio agreed that Mrs. Stenson's husband's death certificate was not essential in order to process the application and that the only reason a letter from her bank was necessary was because Social Security had been slow in providing information about Mrs. Stenson's income. Ms. St. Julio did agree that the information in Mrs. Stenson's file about her monthly income was probably sufficient without requiring a letter from the bank.

I believe, based upon my experience representing other clients who have applied for Medicaid, that the documentation supplied by Mrs. Stenson was sufficient to support her application, but I also advised Ms. St. Julio that we would cooperate with her in trying to obtain whatever documentation she asked for.

Ms. St. Julio suggested that she might forward Mrs. Stenson's Medicaid application to the central office in Manhattan with the documentation already supplied, but that she could not guarantee that the central office would take action in less than thirty days.

11. To my knowledge there are no further administrative steps that can be taken in order to immediately restore benefits to Mrs. Stenson.

WHEREFORE, deponent asks this Court to grant the relief sought in the annexed order to show cause.

/s/

ANN MOYNIHAN

Sworn to before me this
15th day of December, 1978.

/s/

[Notary Public]

Affidavit of Necessity for [Stenson] Order to Show Cause

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

State of New York)
County of Richmond) ss.:

MARSHALL GREEN, being duly sworn, deposes and says:

1. I am an attorney at law duly admitted to practice before this Court and am one of the attorneys for the plaintiff herein.

2. Plaintiff's motion for a preliminary injunction and certification of a class is brought on by order to show cause rather than by notice of motion because named plaintiff's requested temporary restraining order would expire by its term[s] before a motion could otherwise be made returnable and because the plaintiff herein is in dire need. Plaintiff and her class have had their Medicaid benefits terminated, without a determination made that they were in fact ineligible upon the termination of their SSI benefits, and without timely and adequate notice and without the opportunity for a pretermination hearing at which defendants must establish and recipients may contest the termination of their Medicaid benefits. Plaintiff and her class face irreparable injury at this time because they are without Medicaid coverage and therefore cannot obtain necessary and in some cases critically needed medical care and treatment and drugs which endangers their very lives.

3. Pursuant to Rule 65 of the Federal Rule[s] of Civil Procedure plaintiff's attorneys have telephoned the Attorney General of the State of New York, attorneys for

defendant BLUM and the Corporation Counsel for the City of New York, attorney for defendant BERNSTEIN and the U. S. Attorney for the Southern District, attorneys for defendant CALIFANO, on December 15, 1978, and given them notice that the application for temporary restraining order sought herein would be sought from this Court at 10:30 o'clock in the forenoon on December 18, 1978 or as soon thereafter as counsel can be heard.

4. No prior application for the relief requested herein has been made to this or any other court.

/s/
MARSHALL GREEN

Sworn to before me this
15th day of December, 1978.

/s/
[Notary Public]

Answer of Defendant Blum

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

Defendant BARBARA BLUM, Commissioner of the New York State Department of Social Services, by her attorney, ROBERT ABRAMS, Attorney General of the State of New York, for her answer to the complaint herein alleges on information and belief:

FIRST: Avers that paragraphs "1" through "4" and "6" consist of plaintiff's purported characterization of this action and insofar as any response is required, denies the allegations contained therein.

SECOND: Denies the allegations contained in paragraph "5".

THIRD: Denies the allegations contained in paragraph "7" which relate to jurisdiction over the state defendant, and insofar as any response is required with respect to the jurisdictional allegations relating to the other defendants, denies knowledge or information sufficient to form a belief as to the truth thereof.

FOURTH: Admits that plaintiff purports to bring this action as a class action on behalf of the class described in paragraph "9" and otherwise denies the allegations contained in paragraphs "8" and "9".

Answer of Defendant Blum

FIFTH: Denies the allegations contained in paragraph "10".

SIXTH: Denies the allegations contained in paragraphs "11" through "23", and respectfully refers the Court to the statutes and regulations cited therein as the best evidence of their own content.

SEVENTH: Denies the allegations contained in paragraphs "24", "25", and "26", except admits that there is an agreement between HEW and the State of New York with respect to the determination of Medicaid eligibility for New York State residents who receive or who are eligible to receive SSI benefits, and respectfully refers the Court to the text of the agreement in question and to the statutes and regulations cited as the best evidence of their own content.

EIGHTH: Denies the allegations in paragraphs "27", "28", and "29", except admits that [d]efendant Blum is the Commissioner of the New York State Department of Social Services, that she discharges the responsibilities of that office, and that she has an office at Two World Trade Center, New York City; admits that Blanche Bernstein is the Commissioner of the Department of Social Services of the City of New York, that she discharge[s] the responsibilities of that office, and that her office is at 250 Church Street, New York City; and admits that [d]efendant Califano is the Secretary of the United States Department of Health, Education, and Welfare, that he discharges the responsibilities of that office, and that his office is in Washington, D.C.

NINTH: Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs "30", "31", "33", and "34".

Answer of Defendant Blum

TENTH: Admits that because Mrs. Stenson was formerly eligible for SSI benefits she was thereby categorically eligible for Medicaid and otherwise denies the allegations contained in paragraph "35".

ELEVENTH: Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "36", and respectfully refers the Court to plaintiff's Exhibit "A" as the best evidence of the content of the SSI termination notice.

TWELFTH: Denies knowledge or information sufficient to form a belief regarding the truth of the allegations contained in paragraphs "37", "38", "39", "41", "43", "44", "45", "46", "47", and "48".

THIRTEENTH: Denies knowledge and information sufficient to form a belief regarding the truth of the allegations contained in paragraphs "40" and "42", except admits that an application is required to secure medicaid benefits.

FOURTEENTH: Denies the allegations contained in paragraphs "49" through "52".

As and for a First Affirmative Defense

FIFTEENTH: The complaint fails to state a claim upon which relief can be granted against defendant Blum.

As and for a Second Affirmative Defense

SIXTEENTH: Any claim for damages against defendant Blum in her official capacity is barred by the Eleventh Admendment of the Constitution of the United States.

Answer of Defendant Blum

As and for a Third Affirmative Defense

SEVENTEENTH: Defendant Blum has at all times herein acted in good faith.

As and for a Fourth Affirmative Defense

EIGHTEENTH: The claims of the named plaintiff are moot.

WHEREFORE, [d]efendant Blum respectfully prays for judgment:

1. Denying each and every prayer for relief[;]
2. Dismissing the complaint against defendant Blum;
3. Granting defendant Blum the costs and disbursements of this action; and such other and further relief which may be just and proper.

Dated: New York, New York
March 6, 1979

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for [d]efendant Blum

By _____

MARION BUCHBINDER
Assistant Attorney General
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-3023

Defendant Blum's Responses to Plaintiff's First Interrogatories

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

State of New York)
County of Albany) ss:

JOHN JOHNSON, being duly sworn, deposes and says as follows:

1. I am a Senior Medical Assistance Specialist, Division of Medical Assistance, in the New York State Department of Social Services.

2. I respond to the Interrogatories herein as follows:

Q-1. Is there presently, or has there ever been, an agreement in effect between the Department of Health, Education and Welfare and the New York State Department of Social Services, (hereinafter the "Department") pursuant to which the Secretary of Health, Education and Welfare has assumed responsibility for determining the Medicaid eligibility of New York State recipients of Supplemental Security Income (hereinafter "SSI"), as provided by §363-b of the Social Services Law.

A-1. Yes, there is an agreement in effect between the Department of Health, Education and Welfare and The New York State Department of Social Services.

Q-2. If the answer to question one is "yes", (a) give the period(s) covered by any and all such agreements; (b)

attach a copy of all documents constituting any and all such agreements; (c) attach a copy of all documents establishing, amending, or explaining the policy and procedure of the Department (i) determining the initial Medicaid eligibility of New York State residents who are recipients of SSI; (ii) redetermining Medicaid eligibility of New York State residents who are recipients of SSI; (iii) termination of Medicaid eligibility of New York State residents who are recipients of SSI; and (iv) termination of Medicaid cards of present and former New York State SSI recipients.

A-2. (a) January 1, 1974 to present

(b) Attached as Exhibit "A"

(c) Attached as Exhibit "B" is a copy of the following documents:

74 ADM 140
74 ADM 91
73 ADM 197
73 ADM 198
73 ADM 214

Q-3. For each yearly period from January 1974 through December 1977, and for each month beginning January 1978 to the present, answer the following questions *with respect to New York State residents:*

(a) How many received SSI benefits?

(b) Of the individuals included in the answer to 3(a) how many (i) were determined eligible for Medicaid by the Department; (ii) were redetermined to be eligible for Medicaid by the Department; (iii) were provided with Medicaid benefits by the Department?

(c) How many individuals who were receiving SSI benefits or who had been determined ineligible for SSI benefits

were determined ineligible by the Department to receive Medicaid benefits?

(d) Of the individuals included in the answer to 3(c), how many were notified by the Department that their Medicaid benefits were being terminated?

(e) Of the individuals included in the answer to 3(c), how many were sent notices by the Department that they had a right to a fair hearing on the issue of the termination of Medicaid benefits and the right to have aid continue pending a decision after a fair hearing?

(f) How many hearings were held by the Department on the issue of the termination of Medicaid benefits to individuals whose SSI benefits had been or were being terminated?

(g) Of the individuals included in the answer to 3(f), how many received decisions finding them still eligible for Medicaid benefits?

A-3. (a) SSI Recipients

Time Period	*Monthly average*
1974	375,336
1975	412,753
1976	391,712
1977	381,345
1978	*Monthly Active*
January	382,031
February	381,304
March	379,444
April	380,923
May	379,917
June	378,228
July	376,764
August	376,896
September	374,567
October	372,646
November	376,144

(b) i None of the individuals were determined eligible by the Department of Social Services.

ii None of the individuals were redetermined to be eligible by the Department of Social Services.

iii All of the individuals were provided with Medicaid cards.

(c) The information requested is unavailable.

(d) The information requested is unavailable.

(e) The information requested is unavailable.

(f) The information requested is unavailable.

(g) The information requested is unavailable.

Q-4. If the Department notifies or has in the past notified New York State SSI recipients of the termination of their Medicaid benefits, provide a copy of any and all forms used and/or the language used in such notice(s) and the periods during which each of the forms or the language were used.

A-4. ADM 140, attached as Exhibit "B", sets forth the relevant language.

Q-5. If the Department notifies, or has in the past notified, New York State present or former SSI recipients who have been determined ineligible for Medicaid of their right to a fair hearing, attach the forms and the language used for such notice(s).

A-5. ADM 140, attached as Exhibit "B", sets forth the relevant language.

Q-6. Is it the policy of the Department that responsibility for providing "timely" and "adequate" notice and the right to a fair hearing on Medicaid terminations in cases where SSI benefits have been terminated rests with

Defendant Blum's Responses to Interrogatories

(a) The Department of Health, Education and Welfare?

(b) The New York State Department of Social Services?

(c) The New York City Department of Social Services?

A-6. It is the position of the Department of Social Services that the Department of Health, Education and Welfare has responsibility for notifying SSI recipients that their eligibility for Medical Assistance has been termnated as a result of the termination of their SSI benefits.

/s/ JOHN JOHNSON

JOHN JOHNSON

(Jurat omitted in printing.)

Exhibit B Annexed to Responses to Interrogatories—
74 ADM-140

STATE OF NEW YORK
DEPARTMENT OF SOCIAL SERVICES
1450 WESTERN AVENUE
ALBANY, NEW YORK 12203

ABE LAVINE
Commissioner

ADMINISTRATIVE LETTER

TRANSMITTAL NO.: 74 ADM-140

DATE: September 20, 1974

To: Commissioners of Social Services

SUBJECT: Supplemental Security Income
Medical Assistance Implications, Number 4

SUGGESTED
DISTRIBUTION: Medical Assistance Staff

PURPOSE: The purpose of this Administrative Letter is to consolidate the information in 73 PWD-197 and 73 PWD-198, in the light of our experiences with the operation of the SSI Program and the SDX System. The information contained herein, updates and supersedes 73 PWD-198. In addition, questions which have arisen since that time are covered.

The procedures in the sections concerning Third Party Coverage and Unpaid medical bills which relate to blank fields on the SDX are one time only, since the systems for providing this information are now functioning properly. (Page 5)

Exhibit B Annexed to Responses to Interrogatories

1. Determination of Medical Assistance for SSI Beneficiaries

a. *Eligibility Determination*

Under the State/Federal Agreement, an aged, blind or disabled individual who applies for and receives an SSI benefit shall be eligible for MA by virtue of his eligibility for SSI. Under this arrangement, eligibility determination shall be made by the staff of SSA.

Such determination is based upon categorical and financial eligibility standards for SSI. For this group, the Title XIX eligibility criteria for medically needy only are not applicable.

b. *Administrative Responsibility*

SSA will determine and redetermine eligibility for SSI Beneficiaries; local districts shall continue administrative responsibility for all other phases of the MA Program. These functions include but are not limited to the following:

i. Authorize and reauthorize Medical Assistance for SSI eligibles;

ii. Meet emergency Medical Assistance needs;

iii. Issue monthly Medical Assistance Identification Cards for SSI eligibles;

iv. Determine retroactive eligibility for SSI applicants who have unpaid medical bills incurred in the three month period prior to the month of application;

v. Obtain information on third party health insurance from SSI Beneficiaries;

vi. Give prior approval for medical services as required;

vii. Participate with the SSA in the detection and disposition of recipient fraud;

viii. Process medical bills;

ix. Perform utilization review; and

x. Apply adjustment and recovery provisions as set forth in Section 369 of Social Services Law.

Based upon the stated division of responsibilities between Social Services and SSA, all matters of eligibility determination are the responsibility of SSA. Therefore, the provisions of Department Regulation Section 360.6 relating to assignment of property in paragraph (1) of Subdivision (c) thereof are not applicable to persons who are eligible for medical assistance as a result of their eligibility for SSI. Likewise, Department Regulation 360.8 (Transfer of Property) is not applicable to these individuals, except if it is applied by SSA, since it is an *eligibility* matter.

Adjustments and recoveries, however, pursuant to Section 369 of the Social Services Law and subject to the conditions stated therein are an administrative function, and as such are the responsibility of Social Services. In light of this, our suggested letter of notification has been amended to inform newly entitled recipients of this provision. (Exhibit A)

In summary, while Social Services must authorize medical assistance and issue a valid MA identification card to individuals who have been found eligible for SSI benefits by SSA, the above listed administrative rights and responsibilities are retained by Social Services.

Any additional factors which might have a bearing on eligibility for SSI that come to the attention of local social

services districts should be referred, in writing, to the appropriate SSA district office for their investigation and followup. Procedures for providing ongoing information exchange between local social services districts and district offices of the Social Security Administration are currently under development.

2. County of Responsibility for Intra-State Moves

a. In Administrative Letter 73 PWD-198, social services districts were advised that SSI beneficiaries would be assigned to the proper district by this Department. Based upon a change of address, the district of his prior residence will receive a deletion code of 07 in the Transaction Code Field (Field 03). The county of current residence will receive an accretion code of 01 in the Transaction Code Field (Field 03).

The above information applies only to those SSI beneficiaries who are living in their own households or the households of another, Codes A, B or F in State Opt. Supp. Code (Field 103).

When a district receives information that an SSI beneficiary has moved from the district, the district shall continue to provide medical assistance for a period ending on the last day of the calendar month next succeeding the calendar month in which the beneficiary moved, provided that the beneficiary continues to be eligible for such assistance. The district shall provide written notification of the change in district of responsibility to the beneficiary, with a copy to the new district of residence.

The new district of residence shall use this notification, along with other acceptable documentation to authorize medical assistance for the SSI beneficiary

until such time as the change of address is reported to the new district on the SDX.

The notification to the new district of residence shall include any third party insurance information which the former district of residence has obtained.

b. Because Social Services Law and Department Regulations require the local social services districts to retain differing measures of responsibility for individuals in congregate care and in Title XIX medical facilities, when a change of address occurs for such an individual, his data record will not be deleted from the data exchange which a district receives. The district will continue to receive the individual's record until such time as they are able to establish that they do *not* have a continuing responsibility for providing medical assistance.

(1) *Congregate Care*—Individuals receiving care in a congregate facility, signified by SDX Codes C, D or E (Field 103), will not be deleted from the local social services districts' data record in the event of a move to a new district. The district will then ascertain whether it has continuing responsibility for medical assistance in accordance with applicable sections of Social Services Law and Department Regulations.

If the social services district finds that the individual is the responsibility of another district, the district shall:

(i) Send an SDX Change Form (DSS-2284) with a change of address to:

New York State Department of
Social Services
Bureau of Data Processing
1450 Western Avenue
Albany, New York 12203; and

(ii) notify the social services official in the district where responsibility should properly be placed, of the findings of its investigation.

(2) *Title XIX Medical Care*—Individuals receiving care in a Title XIX medical institution (hospital, skilled nursing facility or intermediate care facility), signified by a combination of SDX codes of Z (Field 103) and D (Field 34) likewise, will not be deleted from the local social services districts' data record in the event of a move to a new district. The district will then ascertain whether it has continuing responsibility for medical assistance in accordance with applicable sections of Social Services Law and Department Regulations.

If the social services district finds that the individual is the responsibility of another district, the district shall report to this Department and the new district of responsibility in the same manner as for congregate care.

The above information is technical, dealing with the use of the State Data Exchange in determining the county of proper responsibility. However, sections 62.5 and 365 of Social Services Law and Part 311 of Department Regulations continue to govern the responsibility of social services districts for providing medical assistance.

3. Family Care Cases

Family Care patients are individuals in facilities certified as Family Care homes by the Department of Mental Hygiene and who remain the continuing responsibility of the Department of Mental Hygiene. The State Department

of Social Services currently administers the Medical Assistance Program for these persons, including issuance of MA—ID cards.

In the event that a Family Care case is not identified, and should it be included in the local social services district tape or print-out, no Medical Assistance Identification Card should be issued. Family Care cases included in the district data exchange and identified by the districts as a Family Care case shall be referred to the State immediately via the "SDX Change Form".

4. MA Authorizations for SSI Recipients

The SDX magnetic tape or print-out as issued by the Department, is the Medical Assistance eligibility master file (for SSI recipients) and on the basis of this file, the Commissioner shall issue an authorization for Medical Assistance.

Since data related to SSI eligibility will be received periodically for groups of recipients, districts may wish to adopt some form of the multiple authorization, in lieu of issuing individual DSS-638's (Authorization of Grant). Multiple authorizations should consist of a list of cases for whom a common action is to be taken (i.e., opened or closed cases), and must be accompanied by a letter of authorization from the Commissioner directing the Accounting Division to take such action.

The list of cases must contain sufficient information for ready identification; case name, case number, and Social Security number would be a minimal requirement. Where feasible, the SDX tape or print-out may be considered an acceptable listing for authorization purposes.

For further instructions related to the Accounting functions, districts should refer to Administrative Letters 70

PWD-93 and 71 PWD-18. Each of these Administrative Letters was developed to assist districts in adjusting authorizations to reflect mandated changes in public assistance cash grants.

5. MA-ID Card Issuance

After initiating the appropriate authorization, the local social services districts shall issue an MA-ID card in accordance with existing individual local social services district procedures. The card shall be sent with a notification of the SSI Beneficiary's eligibility for medical assistance (see Suggested Letter, Exhibit A).

6. Third Party Health Insurance

Early eligibility determinations on the part of SSA did not provide information on the existence of third party insurance. In many cases, Third Party Insurance (Field 43) on the SDX was blank. This information is now being provided for new applicants, as of mid-January.

For all cases coded "Y" in Field 43, information on third party coverage is to be obtained. (See Suggested Letter, Exhibit B). In addition, information is to be obtained for those early applicants for whom Field 43 was blank.

In any event, authorization and MA card issuance *shall not be withheld* pending firm knowledge of possible third party insurance. This shall be pursued with the recipient if necessary (second letter, telephone call, home visit). If after diligent efforts on the part of the local social services district to identify this resource, the recipient has continued to refuse to cooperate, the Medical Assistance Identification Card shall be withheld as of the end of the second full month following the month of initial attempt to verify the type and amount of third party coverage. The individual shall

be notified that his card is being withheld, and will continue to be withheld until he is willing to furnish the required information for utilization of this resource. The recipient shall be notified of his opportunity for a fair hearing and shall be given 10 days notice before the ID card is withheld.

7. Unpaid Medical Bills

Early eligibility determinations on the part of SSA did not provide information on the existence of unpaid medical bills during a three month period prior to the month of application. In many cases Retro MA Indicator (Field 44) on the SDX was blank. This information is now being provided for new applicants as of mid-January.

When this indicator (Field 4) is coded "Y", local social services districts shall contact the SSI beneficiary concerning these unpaid medical bills. (Suggested Letter, Exhibit C). In addition, pursuant to Department Regulation, Section 360.16(e), all of the early applicants for SSI where the indicator (Field 44) is blank shall be contacted concerning these unpaid bills. Their eligibility for medical assistance during the retroactive period shall be determined according to medical assistance standards.

(When a presumptively disabled SSI beneficiary, who has unpaid medical bills, dies before final determination of his disability, the process of disability determination will be allowed to continue until a final decision is made. This is for the purpose of setting a date of onset of disability to determine retroactive MA eligibility. The method of reporting this information will be a manual system. Procedures for notification are presently being formulated by SSA. Administrative instructions will be issued to the agencies when they are developed.

When no unpaid bills exist, the disability determination process will cease as soon as the beneficiary's death is reported to SSA.)

Exhibit B Annexed to Responses to Interrogatories

8. SSI Applicants or Beneficiaries Refebred to Social Services for Eligibility Determinations

When the Social Security Administration is unable to determine that eligibility for medical assistance exists, they refer the individual to Social Services for eligibility determination. This is accomplished by an SDX Code of "R" in MA Eligibility (Field 46). This might result from a denial or termination of SSI benefits.

In the event of a denial or termination where notification is required (74 ADM-91, Section A), a suggested letter of notification is attached (Exhibit D). Eligibility, in these cases, shall be determined in accordance with medical assistance standards as outlined in 74 ADM-107 (Section IIIA) and other applicable sections of Department Regulations.

Questions on individual case situations should be addressed to members of the Medical Assistance Eligibility staff at (518) 457-1230.

/s/ Beverlee A. Myer

Deputy Commissioner
Division of Medical Assistance

Exhibit B Annexed to Responses to Interrogatories

Exhibit A to 74 ADM-140

SUGGESTED LETTER OF ACCEPTANCE MA
FOR SSI BENEFICIARIES

Dear

The Social Security Administration has informed us that you are entitled to Supplemental Security Income Benefits (SSI). In New York State, SSI Beneficiaries are also entitled to Medical Assistance Benefits. Each month you will receive a Medical Assistance Identification Card similar to the one which is enclosed. This Card is only valid for the month shown on the Card.

Available medical care and services may be obtained by presenting your valid Medical Identification Card to a participating provider. Providers include, but are not limited to, hospitals, clinics, doctors, dentists, optometrists, opticians and pharmacists. If you have other medical insurance (such as Medicare, Blue Cross, Blue Shield, GHI, etc.) you must also present the identification card which they have issued to you to the person providing the medical care or services.

You will not be expected to repay the cost of medical expenses paid on your behalf, except that the Department of Social Services may make a claim against the estate of an individual who was over the age of 65 when he received this Medical Assistance, and then only if he has no surviving spouse, child under 21 or child of any age who is blind or disabled.

If you have any questions about the services available or the method of obtaining medical care, please contact:

_____ County Department of Social Services

_____

_____ Address

_____ Telephone Number

Sincerely,

Exhibit B Annexed to Responses to Interrogatories

Exhibit D to 74 ADM-140

SUGGESTED LETTER OF NOTIFICATION FOR CLOSED CASES

Dear

The Social Security Administration has informed us that you are (not) (no longer) eligible for Supplemental Security Income Benefits (SSI). Therefore, you are not eligible to receive Medical Assistance Benefits as a result of receiving SSI.

If you continue to have medical needs, you may wish to apply for Medical Assistance only at the following address:

_____County Department of Social Services,
_____
_____

If you have any questions, you may contact the agency at this telephone number _____.

Sincerely,

Proposed Intervenor Murtagh's Order to Show Cause for a Preliminary Injunction, Class Certification, TRO, and Joinder

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 78 Civ. 6044 (RWS)

ELLEN STENSON, *et al.*,

Plaintiffs,

and

MICHAEL MURTAGH, *et al.*,

Plaintiff/Intervenor,

against

BARBARA BLUM, *et al.*,

Defendants.

Upon the attached proposed intervenor complaint, attached affidavits, plaintiff/intervenor's supporting brief dated March 19, 1979, and all prior papers and proceedings in this action, it is

ORDERED, that the defendants or their attorneys show cause before this Court in Room 905 in the United States Court House, Foley Square, New York, New York, on the day of , 1979, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel may be heard, WHY an order should not be made:

Proposed Intervenor Murtagh's Order to Show Cause

1. Certifying the plaintiff class herein pursuant to Rule 23(c)(1) and Rule 23(a) and, in addition Rule 23(b)(2) or in the alternative Rule 23 (B)(1)(A) or (b) of the Federal Rules of Civil Procedure; the class to be defined as all New York State residents who have received or who are receiving Medicaid benefits as recipients of SSI benefits, but whose Medicaid benefits were or are automatically terminated upon a determination that they are no longer entitled to SSI without either determining their eligibility for Medicaid coverage independent of SSI and/or providing timely and adequate notice of the termination and an opportunity for a pretermination hearing at which defendants must establish and the recipients may contest the grounds for termination of their Medicaid benefits.

2. Granting, pending the determination of this action a preliminary injunction pursuant to Rule 65 of the Federal Rule[s] of Civil Procedure, requiring defendants, their officers[,] agents, servants, employees and successors in office to restore Medicaid benefits to the plaintiff/intervenor MICHAEL MURTAGH until such time as defendants determine the eligibility for Medicaid of plaintiff/intervenor on an individual basis and until such time as he is given timely and adequate notice of the proposed termination of his Medicaid benefits and given the opportunity to have a pretermination evidentiary hearing at which defendants must establish and recipient may contest the grounds for termination.

3. Granting, such other and further relief which as to this Court may seem just, equitable and proper.

ORDERED, that pursuant to Rule 24(b)(2) of the Federal Rules of Civil Procedure, MICHAEL MURTAGH be and hereby is permitted to intervene as a plaintiff in the above-entitled action.

Proposed Intervenor Murtagh's Order to Show Cause

ORDERED, pursuant to Rule 65 of the Federal Rules of Civil Procedure, that pending the final determination by this Court of the plaintiff/intervenor's motion for a preliminary injunction, the defendants and their successors in office, agents and employees be temporarily enjoined in that they be required to immediately restore the Medicaid benefits of plaintiff/intervenor and continue benefits until such time as defendants determine his eligibility for Medicaid on an individual basis and until such time as he is given timely and adequate notice of the proposed termination of his Medicaid benefits and given the opportunity to have a pretermination evidentiary hearing at which defendants must establish and the recipient may contest the grounds for termination. Security for this application pursuant to Rule 65 is waived because of the poverty of the plaintiff/intervenor.

Sufficient reason appearing therefor, it is FURTHER ORDERED, that personal service of a copy of this Order and the papers upon which it was granted, on the Attorney General of the State of New York, 2 World Trade Center, New York, New York; and on the Corporation Counsel of the City of New York, 220 Church Street, New York, New York, and on the United States Attorney for the Southern District, One St. Andrews Plaza, New York, New York, on or before o'clock on the day of , 1979, shall constitute sufficient service of this Order.

Dated: New York, New York
, 1979.

United States District Judge

Affidavit of Michael Murtagh in Support of Order to Show Cause

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 78 Civ. 6044 (RWS)

ELLEN STENSON, *et al.*,

Plaintiffs,

and

MICHAEL MURTAGH, *et al.*,

Plaintiff/Intervenor,

against

BARBARA BLUM, *et al.*,

Defendants.

State of New York)
County of Richmond) ss:

MICHAEL MURTAGH, being duly sworn, deposes and says:

1. I am a recipient of Social Security Disability benefits and, until November 1978 received Supplemental Security Income (SSI) benefits and received Medicaid benefits. I make this affidavit in support of the motion for class certification and a preliminary injunction, and in support of my motion to intervene and for a temporary restraining order.

2. Prior to January 1974 I was a recipient of benefits in the State Administered program of Aid to the Aged,

Blind and Disabled (AABD) and I also received Medicaid coverage. In or about January 1974 my case was converted from the AABD program to the federal SSI program. As a recipient of SSI, I at all times received a Medicaid card and Medicaid benefits.

3. On or about September 29, 1978 the Social Security Administration informed me that my SSI benefits would cease because of the fact changes in my income, which consists solely of Social Security benefits, rendered me ineligible for SSI. Said "Notice of Planned Action" further provided "For information about any change in your Medicaid eligibility caused by this action you should get in touch with your local social services agency." A copy of this "Notice of Planned Action" is attached hereto as Exhibit 1.

4. In November 1978 I did not receive my Medicaid card. I suffer from sarcoidosis, which affects my lungs, eyes, liver and other parts of my body. I receive regular treatment from the Mount Sinai Sarcoid Research Institute and the Hospital for Special Surgery and have received cortisone from the Mount Sinai Hospital Pharmacy. In addition, I regularly see a specialist, Dr. Engel and Dr. Addrizzo, who accepts Medicaid. Both doctors prescribe medicine for me which I must obtain from a local pharmacy. When my Medicaid card did not arrive in November 1978 I was unable to keep appointments at the hospitals where I am treated because they refused to take me without a Medicaid card. In addition, I was unable to obtain drugs from my pharmacy without my Medicaid card.

5. I orally complained to the Social Security Administration that I had a currently pending hearing and they reissued my Medicaid card and I was then able to keep my appointments and secure my needed medicines.

6. Since that time, I have received my Medicaid card. However, my attorney has learned, as appears more fully in her affidavit, that the New York City Department of Social Services computer reflects my Medicaid coverage ended January 17, 1979 due to the fact that my SSI benefits have ceased. I have not been asked to recertify my eligibility for Medicaid. I have received no written notice that my Medicaid benefits have been terminated nor have I received notice of my right to a fair hearing, and to aid continuing pending a fair hearing decision.

7. Prior to November 1978, Medicaid paid my medical insurance premiums for Medicare. By notice dated November 6, 1978, I was informed that these premiums would no longer be paid for and that those premiums would be deducted from my Social Security Disability benefits. Since November, 1978 my Social Security Disability benefits have been reduced to reflect the cost of such premiums.

8. Termination of my Medicaid benefits is wrongful and illegal. By virtue of Section 503 of Public Law 94-566 (42 USC §1396(a) note), people whose SSI benefits terminate by reason of increases of their Social Security benefits are automatically eligible for continued Medicaid benefits. In addition, such termination of Medicaid benefits is wrongful due to the fact that I am a disabled individual whose regularly recurring medical expenses based on the medical treatments testified to above and required each month far exceed my income and would reduce my income far below the Medicaid eligibility level. New York State Social Services Law §366(1)(a)(5). Finally, such termination is wrongful on the grounds that, as an individual whose case was converted from AABD to SSI in 1974, I am entitled to Medicaid benefits even if my SSI benefits can legitimately be terminated for increases in my Social Security benefits.

9. I am now in danger of being unable to secure as in November 1978, the medical treatments and medicines upon which my health and well-being depend. I am scared that hospitals will again refuse to treat me and that pharmacies will again refuse to honor my prescriptions. I am also scared that I will now be billed for the costs of treatments already incurred although I have at all times been eligible for Medicaid benefits. I make this affidavit in support of the motion for class certification and a preliminary injunction, and in support of my motion to intervene and for a temporary restraining order.

10. I seek a temporary restraining order ordering defendants to continue to issue to me a Medicaid card and ordering continuing Medicaid eligibility on the grounds that even a temporary gap in my benefits could create a situation of grave danger to my life, health and safety.

WHEREFORE, I request the court grant me permission to intervene, grant a temporary [restraining] order, and grant a preliminary injunction.

/s/ MICHAEL MURTAGH

MICHAEL MURTAGH

Sworn to before me
March 19, 1979.

/s/ ANN MOYNIHAN

ANN M. MOYNIHAN
Notary Public, State of New York
No. 24-4677122
Qualified in Kings County
Commission Expires March 30, 1980

Affidavit of Ann Moynihan in Support of [Murtagh] Order to Show Cause

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 78 Civ. 6044 (RWS)

ELLEN STENSON, individually and on behalf of all other persons similarly situated,

Plaintiff

and

MICHAEL MURTAGH and [DOROTHY WILSON], individually and on behalf of all other persons similarly situated,

Plaintiff-Intervenors

against

BARBARA BLUM, individually and in her capacity as Commissioner of the New York State Department of Social Services, BLANCHE BERNSTEIN, individually and in her capacity as Commissioner of the New York City Department of Social Services, and JOSEPH CALIFANO, Secretary of the Department of Health, Education and Welfare, individually and as Secretary,

Defendants

ANN MOYNIHAN, being duly sworn, deposes and says:

1. I am of counsel to Joan Mangones, The Legal Aid Society, 42 Richmond Terrace, Staten Island, New York, attorney for Plaintiff and Plaintiff-intervenors[.]

Affidavit of Ann Moynihan in Support of [Murtagh] Order to Show Cause

2. I make this affidavit in support of Plaintiff-intervenor MICHAEL MURTAGH's motion to intervene, his application for a temporary restraining order, and in support of Plaintiff and Plaintiff-intervenors' motion for class certification and a class wide preliminary injunction.

3. On February 2, 1979, I called [the] office of the Director of Medicaid, located on 34th Street, New York, New York, to ascertain whether Michael Murtagh was presently covered under the medical assistance ("Medicaid") program. I dialed 790 3717 and spoke with a woman who identified herself as Ms. Gilliard.

4. I asked Ms. Gilliard if she would check the computer rolls to determine whether Michael Murtagh was presently covered.

5. Ms. Gilliard advised me that Mr. Murtagh's [M]edicaid case was closed "on the SSI screen." She explained that s indicated that Mr. Murtagh had been cut off SSI, and that his Medicaid benefits were therefore cut off.

6. I then asked Ms. Gilliard if the computer indicated the reason for the cut-off. She said that it did not. I then asked whether the computer would indicate that someone was cut off SSI because of Social Security increases. Ms. Gilliard advised me that cases of cut off due to Social Security increases were normally followed by the letters "MMM", but that no such letters followed Mr. Murtagh's name on the computer.

7. I then asked Ms. Gilliard whether it made any difference that Mr. Murtagh was a "grandfathered" SSI recipient, and whether such a fact would be reflected on the computer printout. She advised me that such information

would not be available on the computer, and that she did not think his "grandfathered" status would change the effect of the SSI cut-off.

8. Ms. Gilliard then advised me that she would check the "Medicaid screen" to see what information the City presently had on the case.

9. She advised me that the Medicaid computer file still showed Mr. Murtagh as eligible for Medicaid, but that this merely meant that the information from the SSI computer files had not been transferred to the Medicaid computer files.

10. I [then] asked Ms. Gilliard what the two different file readings meant as far as Mr. Murtagh's present coverage was concerned. Ms. Gilliard advised me that Medicaid might very well refuse to pay bills incurred by Mr. Murtagh in the present month when those bills were eventually submitted to Medicaid by providers.

11. I asked Ms. Gilliard if this was true even if Mr. Murtagh had a presently valid Medicaid card. She said yes, and advised me to have Mr. Murtagh reapply for Medicaid immediately, as this was the only way he could be sure he would not be liable for the bills.

12. After my conversation with Ms. Gilliard, Mr. Murtagh received an interim Medicaid authorization valid through February 28, 1979. The form was signed by Mr. Gilliard.

13. On or about February 27, 1979 after learning that Mr. Murtagh had received the interim Medicaid card, I again called the Bureau of Medical Assistance and asked for Mr. Murtagh's status on the computer. I was advised by a worker that according to the computer Mr. Murtagh

was no longer covered for Medicaid as of January 17, 1979 and that the only remedy available was for Mr. Murtagh to reapply for Medicaid.

14. Mr. Murtagh received a Medicaid card for March 1979, but based on his coverage status on the New York City Department of Social Services is in danger of not receiving his card for April 1979, and his attorneys have twice been advised that the only way to ensure his continued coverage is to reapply for Medicaid.

/s/ Ann Moynihan

Ann Moynihan

(Jurat omitted in printing.)

Affidavit of Necessity for [Murtagh] Order to Show Cause

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 78 Civ. 6044 (RWS)

ELLEN STENSON, *et al.*,

Plaintiffs,

and

MICHAEL MURTAGH, *et al.*,

Plaintiff/Intervenor,

against

BARBARA BLUM, *et al.*,

Defendants.

State of New York)
County of Richmond) ss.:

ANN MOYNIHAN, being duly sworn, deposes and says:

1. I am one of the attorneys for the proposed plaintiff/intervenor herein.

2. Plaintiff/intervenor's motion for a preliminary injunction is brought on by order to show cause rather than by notice of motion because plaintiff/intervenor's requested temporary restraining order would expire by its term before a motion could otherwise be made returnable and be-

cause the plaintiff/intervenor has had or is in imminent and immediate danger of having his Medicaid benefits terminated and thus face irreparable injury in that without benefits he will be unable to secure necessary medical treatment and prescriptive medicines.

3. Pursuant to Rule 65 of the Federal Rules of Civil Procedure I telephoned the Attorney General of the State of New York, Assistant Attorney General MARION BUCHBINDER, attorney for defendant BLUM; the Corporation Counsel of the City of New York and the Human Resources Administration, Assistant Counsel HENRY ADLER, attorneys for defendant BERNSTEIN and the United States Attorney for the Southern District, Assistant U. S. Attorney, THOMAS WARREN, attorney for defendant CALIFANO, on the 19th day of March, 1979 at 10:30 o'clock and gave them notice that the application to intervene, for a temporary restraining order and for a joinder order sought herein would be sought from this Court at 10:30 o'clock on March 20, 1979 before one of the United States District Judges in Part One.

4. No prior application for the relief requested herein has been made to any Court.

/s/ ANN MOYNIHAN

ANN MOYNIHAN

Sworn to before me this
19 day of March 1979.

/s/ PAULA GALOWITZ

PAULA GALOWITZ
Notary Public, State of New York
No. 31-4656934
Qualified in New York County
Commission Expires March 30, 1979

Proposed Intervenor Wilson's Order to Show Cause for a Preliminary Injunction, Class Certification, TRO, and Joinder

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 78 Civ. 6044 (RWS)

ELLEN STENSON, individually and on behalf of all other persons similarly situated,

Plaintiff,

and DOROTHY WILSON, *et al.*,

Plaintiff/ Intervenor,

against

BARBARA BLUM, individually and in her capacity as Commissioner of the New York State Department of Social Services, BLANCHE BERNSTEIN, individually and in her capacity as Commissioner of the New York City Department of Social Services, and JOSEPH CALIFANO, Secretary of the Department of Health, Education and Welfare, individually and as Secretary,

Defendants.

Upon the attached proposed [intervenor] complaint, attached affidavits, plaintiff/intervenor's supporting brief dated March 19[,] 1979, and all prior papers and proceedings in this action it is

Proposed Intervenor Wilson's Order to Show Cause

ORDERED, that the defendants or their attorneys show cause before this Court in Room 905 in the United States Courthouse, Foley Square, New York, on the day of 1979, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel may be heard, WHY an order should not be made:

1. Certifying the plaintiff class herein pursuant to Rule 23(c)(1) and Rule 23(a) and, in addition Rule 23(b)(2) or in the alternative Rule 23(B)(1)(A) or (b) of the Federal Rules of Civil Procedure; the class to be defined as all New York State residents who have received or who are receiving Medicaid benefits as recipients of S.S.I. benefits, but whose Medicaid benefits were or are automatically terminated upon a determination that they are no longer entitled to S.S.I. without either determining their eligibility for Medicaid coverage independent of S.S.I. and/or providing timely and adequate notice of the termination and an opportunity for a pretermination hearing at which defendants must establish and the recipients may contest the grounds for termination of their Medicaid benefits.

2. Granting, pending the determination of this action a preliminary injunction pursuant to Rule 65 of the Federal Rule[s] of Civil Procedure, requiring defendants, their officers, agents, servants, employees and successors in office to restore Medicaid benefits to the plaintiff/intervenor DOROTHY WILSON until such time as defendants determine the eligibility for Medicaid of plaintiff/intervenor on an individual basis and until such time as she is given timely and adequate notice of the proposed termination of her Medicaid benefits and given the opportunity to have a predetermination evidentiary hearing at which defendants must establish and [the] recipient may contest the grounds for termination.

3. Granting, such other and further relief which as to this Court may seem just, equitable and proper.

Proposed Intervenor Wilson's Order to Show Cause

ORDERED, that pursuant to Rule 24(b)(2) of the Federal Rules of Civil Procedure, DOROTHY WILSON be and hereby is permitted to intervene as a plaintiff in the above-entitled action.

ORDERED, pursuant to Rule 65 of the Federal Rules of Civil Procedure, that pending the final determination by this Court of the plaintiff[/]intervenor's motion for a preliminary injunction, the defendants and their successors in office, agents and employees be temporarily enjoined in that they be required to immediately restore the Medicaid benefits of plaintiff[/]intervenor and continue benefits until such time as defendants determine her eligibility for Medicaid on an individual basis and until such time as she is given timely and adequate notice of the proposed termination of her Medicaid benefits and given the opportunity to have a pretermination evidentiary hearing at which defendants must establish and the recipient may contest the grounds for termination. Security for this application pursuant to Rule 65 is waived because of the poverty of the plaintiff/intervenor.

Sufficient reason appearing therefor, it is further

ORDERED that personal service of a copy of this Order and the papers upon which it was granted, on the Attorney General of the State of New York, 2 World Trade Center, New York, New York; and on the Corporation Counsel of the City of New York, 220 Church Street, New York, New York, and on the United States Attorney for the Southern District, One St. Andrews Plaza, New York, New York, on or before o'clock on the day of , 1979, shall constitute sufficient service of this Order.

Dated: New York, New York
1979.

United States District Judge

Affidavit of Dorothy Wilson in Support of Order to Show Cause

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 78 Civ. 6044 (RWS)

ELLEN STENSON, *et al.*,

Plaintiffs,

and

DOROTHY WILSON, *et al.*,

Plaintiff/Intervenor,

against

BARBARA BLUM, *et al.*,

Defendants.

State of New York)
County of Kings) ss.:

DOROTHY WILSON, being duly sworn, deposes and says:

1. I am a recipient of Special Security Disability benefits and, until March, 1979 received Supplemental Security Income (SSI) benefits and received Medicaid benefits. I make this affidavit in support of the motion for class certification and a class-wide preliminary injunction, the motion to intervene and for a temporary restraining order in the above-entitled lawsuit.

2. I am a fifty-seven year old woman living with my daughter and her children in apartment 2L at 1084 Nos-

trand Avenue, Brooklyn, New York. My daughter receives supplemental assistance from the Department of Social Services for her children.

3. My only source of income is social security disability payments of $254.30 a month. I have no other sources of income.

4. I have a heart condition and was hospitalized in May, 1978 for a stroke. Additionally, I suffer from osteo-arthritis, and hypertension. I have trouble walking, get numbness in my legs and arm, swellings in my legs and dizziness. I take much medication daily for my arthritis, my nervousness and to prevent infection in my bones.

5. As a result of my disabilities, I frequently require medical assistance. I am presently receiving physical therapy two times a week, on Tuesdays and Thursdays, at Downtown Medical Center; the doctor has arranged transportation for me by ambulette for these appointments because of my difficulties in walking. Additionally, I have a medical appointment on March 29, 1979 with Dr. Sheldon, the doctor who treated me while I was hospitalized with a stroke. On April 1, 1979 I have an appointment at Kings County Hospital, "E" Building for tests on my muscles. On April 2, 1979 I have an appointment at Downstate Medical Center to see the doctor about my physical therapy and on April 3rd, I have to go to the Neurology Clinic at Downstate Medical Center. I need my Medicaid Card for these appointments.

6. I had been receiving Supplemental Security Income payments because of my disability. I was notified in February that my Supplemental Security Income payments were being stopped because I was found eligible to receive

Social Security disability payments in the amount of $254.30 monthly. The notice I received about my SSI in February did not tell me my Medicaid benefits were being stopped. The notice simply said:

> FOR INFORMATION ABOUT ANY CHANGE IN YOUR MEDICAID ELIGIBILITY CAUSED BY THIS ACTION YOU SHOULD GET IN TOUCH WITH YOUR LOCAL SOCIAL SERVICES AGENCY. (Exhibit A)

7. I did not appeal from the termination of my Supplemental Security Income benefits because I started to receive Social Security disability benefits.

8. I mailed said notification about the stopping of my SSI payments to my attorney at the Legal Aid Society. My attorney had been assisting me in my claim for Social Security disability benefits.

9. Upon information and belief, my attorney called the local social services agency and was informed that Medicaid stops automatically when a person stops receiving S.S.I., and that I had to re-apply for Medicaid.

10. I was never notified that my Medicaid coverage was being terminated or is about to be imminently terminated and was never informed that I had a right to have a hearing before my Medicaid benefits were cut-off.

11. I believe I am entitled to receive Medicaid even though I am no longer receiving Supplemental Security Income benefits because my income is only $254.30 per month. My lawyer has advised me that, given my income and my medical expenses, I am eligible for Medicaid as "medically need[y]" or on a "spendown" basis, whereby I pay a certain amount toward my medical bills each month and Medicaid pays for the rest.

12. I am a disabled individual whose regularly recurring medical expenses based on the medical treatments testified to above far exceed my income and would reduce my income far below the Medicaid eligibility level.

13. My attorney has informed me that, in my circumstances even if I have a current Medicaid card, I may be denied Medicaid coverage by a provider. Upon information and belief, providers can and do call the Medicaid office, even if a person has a current Medicaid card, to determine if a case is still deemed open on the computer rolls. I have been or will be imminently terminated for Medicaid and therefore [do] not appear as an open case on the computer. Although I presently have a Medicaid card for March, 1979 it could already be or will be immediately invalid.

14. I am now in danger of being unable to secure the medical treatments and medicines upon which my health and well-being depend. I am afraid that hospitals will refuse to treat me, that pharmacies will refuse to honor my prescriptions and that I may be billed for the costs of treatments although I am eligible for Medicaid benefits.

15. I seek a temporary restraining order ordering defendants to continue to issue to me a Medicaid card and ordering continued Medicaid eligibility on the grounds that even a temporary gap in my benefits would create a situation of grave danger to my life, health and safety.

WHEREFORE, I request the court grant me permission to intervene, grant a temporary [restraining] order, and grant a preliminary injunction.

/s/ DOROTHY WILSON

DOROTHY WILSON

Sworn to before me this
19th day of March, 1979

DANIEL F. BARRETT

[Notary Public]

Affidavit of Paula Galowitz in Support of [Wilson] Order to Show Cause

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action No: 78 Civ. 6044 (RWS)

ELLEN STENSON, individually and on behalf of all other persons similarly situated,

Plaintiff

and DOROTHY WILSON, et al

Plaintiff/Intervenor,

against

BARBARA BLUM, individually and in her capacity as Commissioner of the New York State Department of Social Services, BLANCHE BERNSTEIN, individually and in her capacity as Commissioner of the New York City Department of Social Services, and JOSEPH CALIFANO, Secretary of the Department of Health, Education and Welfare, individually and as Secretary,

Defendants.

State of New York)
County of New York) ss.:

PAULA GALOWITZ, being duly sworn, deposes and says:

1. I am an attorney duly admitted to practice in this court, and am of counsel to MORTON B. DICKER, ESQ., THE LEGAL AID SOCIETY, 11 Park Place, New York, New York,

attorney for the named plaintiff/intervener DOROTHY WILSON.

2. On March 14, 1979 I received from DOROTHY WILSON a copy of the Notice of Planned Action dated February 23, 1979 that she had received from the Social Security Administration. Said notice, which is attached hereto as Exhibit A, informed Ms. WILSON that her Supplemental Security Income benefits were being terminated[.] The notice did not advise Ms. WILSON that her Medicaid benefits were terminating with her S.S.I. benefits nor did it provide her with a right to a pre-termination hearing in connection with her Medicaid benefits. The only information about Medicaid in said notice was the statement that "for information about any change in your Medicaid eligibility caused by this action you should get in touch with your local social services agency."

3. I telephoned Ms. WILSON who advised me that she had not contacted the Social Security Administration or the local social services agency about said notice.

4. On or about March 14, 1979 I called the local social services agency, Jamaica Medicaid Center. (The only two listings for Medicaid in the Brooklyn Telephone Directory is the office in Manhattan and the Jamaica Medicaid Center). I spoke with Ms. Leggard who informed me that when a person is terminated from S.S.I. the Medicaid also stops and that the person has to re-apply for Medicaid. When I asked her how long it takes till the Medicaid stops, she responded that it should be immediately.

5. On or about March 16, 1979 I had occasion to call the Manhattan office of Medicaid in reference to another client. I spoke with Mr. Goodman in the Deputy Director's office. He informed me that when a person is terminated

from S.S.I. the Medicaid coverage is automatically ended; the Social Security Administration sends the notice to the State Department of Social Services who in turn notifies the local district to remove the person from the Medicaid computer rolls. After that occurs, monthly Medicaid cards to the person stop being issued.

6. Upon information and belief, a person could receive a Medicaid card and subsequently, during the month that the card is supposed to be valid, be removed as an open case on the computer rolls. It is my understanding that medical providers can and do call Medicaid to determine if a case is still open on the computer. Therefore, even if Ms. WILSON has a current Medicaid card, she could be a closed case on the Medicaid computer rolls and not be able to secure medical assistance benefits.

WHEREFORE, deponent asks this Court to grant the relief sought in the annexed order to show cause.

/s/ PAULA GALOWITZ

PAULA GALOWITZ

(Jurat omitted in printing.)

Affidavit of Necessity

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 78 Civ. 6044 (RWS)

ELLEN STENSON, *et al.*,

Plaintiffs,

and

DOROTHY WILSON, *et al.*,

Plaintiff/Intervenor,

against

BARBARA BLUM, *et al.*,

Defendants.

State of New York)
County of New York) ss.:

PAULA GALOWITZ being duly sworn, deposes and says:

1. I am an attorney at law duly admitted to practice before this Court and am one of the attorneys for the plaintiff/intervenor's [sic] herein.

2. Plaintiff/intervenor's motion for a temporary restraining order is brought on by order to show cause rather than by notice of motion because plaintiff/intervenor is in dire need. Plaintiff/intervenor and her class have had their Medicaid benefits terminated or about to be immi-

nently terminated without a determination made that they were in fact ineligible upon the termination of their SSI benefits, and without timely and adequate notice and without the opportunity for a pretermination hearing at which defendants must establish and recipients may contest the termination of their Medicaid benefits. Plaintiff/intervenor and her class face [irreparable] injury at this time because they are without or in imminent danger of losing Medicaid coverage and therefore cannot obtain necessary and in some cases critically needed medical care and treatment and drugs which endangers their very lives.

3. Pursuant to Rule 65 of the Federal Rule[s] of Civil Procedure plaintiff/intervenor's attorneys have telephoned the Attorney General of the State of New York, attorneys for defendant BLUM and the Corporation Counsel for the City of New York, attorney for defendant BERNSTEIN and the United States Attorney for the Southern District, attorneys for defendant CALIFANO, on March 19, 1979, and given them notice that the application for [the] temporary restraining order sought herein would be sought from this Court at 10:30 o'clock in the Forenoon on March 20, 1979 or as soon thereafter as counsel can be heard.

4. No prior application for the relief requested herein has been made to this or any other court.

/s/ PAULA GALOWITZ

PAULA GALOWITZ

(Jurat omitted in printing.)

Affidavit of Ann Moynihan in Support of Motion for Class Certification and Preliminary Injunction

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 78 Civ. 6044 (RWS)

ELLEN STENSON, *et al.*,

Plaintiffs,

and

MICHAEL MURTAGH, *et al.*,

Plaintiff/Intervenor,

against

BARBARA BLUM, *et al.*

Defendants.

State of New York)
County of Richmond) ss:

ANN MOYNIHAN, being duly sworn, deposes and says:

1. I am of counsel to JOAN MANGONES, ESQ., THE LEGAL AID SOCIETY, 42 Richmond Terrace, New York, New York, attorney for named plaintiff ELLEN STENSON and proposed plaintiff/intervenor MICHAEL MURTAGH.

2. I make this affidavit in support of plaintiff and plaintiff/intervenor's motion for class certification and a class-wide preliminary injunction.

3. Attached are copies of letters from twenty-two local service departments in New York State.

4. Counsel for defendant BARBARA BLUM has advised me that these letters were received by the New York State

Department of Social Services in response to an inquiry as to the notice provided by local departments to individuals whose Medicaid benefits are being terminated after the State has been notified by the Department of Health, Education and Welfare that SSI coverage has been terminated.

5. Of the twenty-two local social services departments, 19* indicate that they notify recently terminated SSI recipients by the letter required by 74 ADM-140, the New York State Department of Social Services memorandum on the question. The letters contain a statement to the effect that the individual's SSI benefits have terminated and therefore Medicaid benefits have terminated. The recipient is advised to reapply for Medicaid.

Three counties (Cattaragus, Essex and Warren) send a notice of intent to discontinue medical assistance on the basis of the SSI cut-off and advise of their right to a fair hearing.

6. I did not receive a copy of a response, if any, from the New York City Department of Social Services. Plaintiff ELLEN STENSON and plaintiff/intervenors MURTAGH and WILSON allege that they received no notice from the New York City Department of Social Services. Attachment 23 is an affidavit from SYLVIA ALFONSO, another New York City resident who never received notice from the New York City Department of Social Services when her [M]edicaid benefits were terminated in May 1978 after she became ineligible for SSI benefits.

/s/ ANN MOYNIHAN

ANN MOYNIHAN

(Jurat omitted in printing.)

* Cayuga, Chautauqua, Chenango, Delaware, Fulton, Granville, Greene, Madison, Montgomery, Otsego, Orange, Orleans, Plattsburgh, Rensselaer, Schoharie, Steuben, Schuyler, St. Lawrence, Westchester.

Defendant Blum's Notice of Motion for Summary Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

SIRS:

PLEASE TAKE NOTICE that upon the State defendant's Statement Pursuant to Rule 9(g), the affidavits of Richard Cody and Marion Buchbinder, and the State defendant's memorandum of law in support of this motion, the State defendant will move this Court at a motion term to be held at the United States Courthouse, Room 905, Foley Square, New York, New York, on the 30th day of March, 1979, at 2:00 P.M., or as soon thereafter as counsel can be heard, for an order pursuant to Rule 56 of the Federal Rules of Civil Procedure granting summary judgment dismissing the complaint, and for such other and further relief the Court deems just and proper.

The grounds of this motion, as set forth in the State defendant's memorandum of law, are that there are no genuine issues of any material fact, and the State defendant is entitled to judgment as a matter of law in that none of her actions have violated plaintiff's constitutional or statutory rights.

Dated: New York, New York
March 27, 1979

Yours, etc.,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Defendant Blum

Defendant Blum's Notice of Motion for Summary Judgment

By /s/ MARION BUCHBINDER

MARION BUCHBINDER
Assistant Attorney General
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-3023

To: THE LEGAL AID SOCIETY
Staten Island Neighborhood Office
42 Richmond Terrace
Staten Island, N.Y. 10301

THE LEGAL AID SOCIETY
Park Place Office
11 Park Place
New York, N.Y. 10007

THOMAS WARREN
Assistant United States Attorney
One St. Andrew's Plaza
New York, N.Y. 10007

HENRY ADLER, ESQ.
New York City Human Resources
Administration
220 Church Street
New York, N.Y. 10013

Defendant Blum's Statement Pursuant to Rule 9(g) of the General Rules of the Southern and Eastern District[s] of New York

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

78 Civ. 6044 (R.W.S.)

ELLEN STENSON, individually and on behalf of all other persons similarly situated,

Plaintiff.

against

BARBARA BLUM, individually and in her capacity as Commissioner of the New York State Department of Social Services, BLANCHE BERNSTEIN, individually and in her capacity as Commissioner of the New York City Department of Social Services, and JOSEPH CALIFANO, Secretary of the Department of Health, Education and Welfare, individually and as Secretary,

Defendants.

Pursuant to Rule 9(g) of the General Rules of this Court, defendant Blum contends that the following material facts are not in dispute:

Plaintiff Stenson

1. Prior to August 1978 plaintiff Stenson was in receipt of SSI benefits.

Defendant Blum's Statement Pursuant to Rule 9(g)

2. Because plaintiff Stenson was in receipt of SSI benefits she was "categorically needy" for the purpose of medical eligibility, and so she also received medicaid.

3. The Secretary of the Department of Health, Education and Welfare (HEW) had determined that plaintiff Stenson was categorically eligible to receive [M]edicaid benefits, pursuant to an Agreement between the State of New York and the Secretary of HEW, and, pursuant to that Agreement, the Secretary had notified the State of his determination.

4. By notice dated July 3, 1978, the Department of Health, Education and Welfare advised plaintiff Stenson that her SSI check would stop in August, 1978, because an increase in her income had rendered her ineligible for SSI.

5. The notice further advised plaintiff Stenson that she should get in touch with her local social services agency for information about any change in her medicaid eligibility caused by the termination of her SSI benefits.

6. In addition, the notice informed plaintiff Stenson that she had a right to appeal, and that her payments would be continued or reinstated if she requested an appeal within 10 days of receiving the notice.

7. Plaintiff Stenson did not get in touch with her local social services agency for information regarding a possible change in her medicaid eligibility; nor did she appeal the decision to terminate her SSI benefits.

8. Plaintiff Stenson's SSI benefits were terminated as of August, 1978, and her medicaid coverage ceased as of November, 1978.

9. When plaintiff Stenson's SSI benefits ceased, she was no longer categorically eligible to receive medicaid.

Defendant Blum's Statement Pursuant to Rule 9(g)

10. The New York State Department of Social Services requires New York City (as a local social services district) to advise former SSI recipients that their medicaid benefits will cease with their SSI payments because they were only eligible to receive medicaid by virtue of their eligibility for SSI; and that if they still desire to receive medicaid, they must apply [therefor] at the office of the local social services district.

11. New York City did not so advise plaintiff Stenson.

12. Plaintiff Stenson applied for medicaid benefits under New York's "medically needy" program in November, 1978, by completing an application [therefor] provided by the New York City Department of Social Services.

13. The criteria for eligibility for medicaid under the "medically needy" program is different than the criteria used to determine the medicaid eligibility of SSI recipients.

14. The determination of whether a New York City resident is eligible for benefits under the medically needy program is made by the New York City Department of Social Services.

15. Plaintiff Stenson was found eligible to receive medical assistance under the medically needy program on a "spend down" basis in January, 1979.

16. When plaintiff Stenson had received SSI benefits, she had also received full coverage of her medical costs, and did not have to "spend down" any of her own income to meet those costs.

Proposed Intervenor Wilson

17. Proposed Intervenor Wilson is an SSI recipient who received a notice from HEW dated February 23, 1979, that her SSI payments would stop as of April, 1979.

Defendant Blum's Statement Pursuant to Rule 9(g)

18. The form of the notice is the same as the form of the notice received by plaintiff Stenson.

19. Ms. Wilson did not appeal HEW's determination regarding her ineligibility for SSI.

20. Ms. Wilson mailed HEW's notice to her Legal Aid Attorney, who called the local social services agency and was informed that Ms. Wilson's medical assistance would terminate when she stopped [receiving] SSI, and she would have to re-apply for medicaid.

21. While Ms. Wilson receives SSI payments she is categorically eligible to receive medicaid. The determination of her categorical medicaid eligibility was made by HEW pursuant to the Agreement between the State of New York and the Secretary of HEW. However, that categorical eligibility will cease when her SSI payments cease.

22. If Ms. Wilson desires to receive medicaid after her SSI payments cease, she must demonstrate that she is eligible to receive medicaid under New York's medically needy program, which has different eligibility criteria than the categorically needy program under which she has been receiving medical assistance due to her SSI eligibility.

23. Although Ms. Wilson has been advised that she must re-apply for medical assistance, she had not done so as of March 20, 1979.

24. At this date, Ms. Wilson's medicaid authorization has not been terminated.

Defendant Blum's Statement Pursuant to Rule 9(g)

Proposed Intervenor Murtagh

25. Proposed intervenor Murtagh began to receive SSI benefits in or about January, 1974, when the SSI program came into existence.

26. Because he was in receipt of SSI assistance, Mr. Murtagh was also ["categorically needy"] for the purpose of [M]edicaid eligibility, and his eligibility for medical assistance was determined and redetermined by the Secretary of the Department of HEW, who notified the State of his determinations pursuant to the Agreement between the State of New York and the Secretary of HEW.

27. By notice dated September 29, 1978, HEW advised Mr. Murtagh that his SSI payments would stop in November, 1978, because an increase in his income rendered him ineligible for SSI.

28. The form of the notice received by Mr. Murtagh is the same as the form of the notice received by plaintiff Stenson.

29. It is the practice of HEW to notify the State of its determination of SSI ineligibility at about the same time that it notifies the SSI recipient.

30. Mr. Murtagh thereafter requested a timely hearing to contest the determination of the Secretary of HEW that he was no longer eligible for SSI.

31. In November, 1978, Mr. Murtagh did not receive his [M]edicaid card.

32. Mr. Murtagh orally advised the Social Security Administration that he had a pending hearing, and his medical assistance was reinstated.

Defendant Blum's Statement Pursuant to Rule 9(g)

33. After Mr. Murtagh's hearing, the determination that Mr. Murtagh is no longer eligible for SSI was affirmed by HEW.

34. Mr. Murtagh received a [M]edicaid card for March, 1979, but his attorneys have twice been advised that the only way to ensure his continued coverage is to re-apply for Medicaid.

35. As of March 20, Mr. Murtagh had not re-applied for Medicaid.

Dated: New York, New York
March 27, 1979

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Defendant Blum

By /s/ MARION BUCHBINDER

MARION BUCHBINDER
Assistant Attorney General
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. (212) 488-3023

Affidavit of Marion Buchbinder

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

78 Civ. 6044 (R.W.S.)

ELLEN STENSON, individually and on behalf of all other persons similarly situated,

Plaintiff,

against

BARBARA BLUM, individually and in her capacity as Commissioner of the New York State Department of Social Services, *et al.*,

Defendants.

State of New York)
County of New York) ss.:

MARION BUCHBINDER, being duly sworn deposes and says:

1. I am an Assistant Attorney General in the office of ROBERT ABRAMS, Attorney General of the State of New York, attorney for defendant Blum. I make this affidavit in support of defendant Blum's motion for summary judgment and in opposition to plaintiff's motion for a preliminary injunction.

2. On March 20, 1979, I was advised by counsel for the proposed intervenors that as of that date neither proposed

internevor had applied for assistance under New York's "medically needy" program.

3. I have also been advised by counsel for defendant Secretary of Health Education and Welfare that proposed intervenor Murtagh requested a timely hearing to challenge HEW's determination to terminate his SSI payments, and that after said hearing, HEW affirmed its determination.

/s/ MARION BUCHBINDER

MARION BUCHBINDER

[Jurat Omitted.]

Affidavit of Richard T. Cody

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

State of New York)
County of Albany) ss.:

RICHARD T. CODY, being duly sworn, deposes and says as follows:

1. I am the Director, Medicaid Eligibility and local Monitoring Section, Division of Medical Assistance in the New York State Department of Social Services. As such, I am familiar with the eligibility requirements for Medical Assistance.

2. I make this affidavit in opposition to plaintiffs' motion for a preliminary injunction.

3. This lawsuit concerns the operation of two separate programs. The first program is Supplemental Security Income (SSI), a cash assistance program for aged, blind and disabled persons. The eligibility requirements for this program, which is totally administered by the Federal Department of Health, Education and Welfare (DHEW) are set forth in Title XVI of the Social Security Act (14 USC §1381 et seq.). Persons who are eligible for or are in receipt of SSI benefits are also automatically eligible for Medical Assistance for the "categorically needy" by agreement with DHEW. Under this agreement annexed hereto as Exhibit "A" the Secretary of DHEW makes

determinations of Medicaid eligibility with respect to individuals who are eligible to receive SSI.

4. The second program is Medical Assistance for the "medically needy." This program is administered by Social Services districts under the supervision of the State Department of Social Services. Eligibility for the "medically needy" program is set forth in §366(1)(a)(5) of the New York State Social Services Law, consistent with Title XIX of the Social Security Act (42 USC §1396 et seq.). In order to be eligible for public assistance under this program, persons must meet the statutory income and resource requirements set forth in §366(1)(a)(5). However, if their income and resources exceed these requirements they may still be eligible under this program if the deduction of their medical expenses from their income and resources results in a level of income and resources within the boundaries of the program. These persons are eligible on a "spend-down" basis. When a person desires medical assistance under this program they submit the required information to the local State Social Services district, which then determines eligibility and ineligibility.

5. However, as stated above, when a person receive[s] medical assistance under the "categorically needy" program their eligibility for this program has been determined under the above-mentioned agreement by DHEW and is contingent on their eligibility to receive SSI. When DHEW determines that a person is no longer eligible to receive SSI it notifies that individual of [his] right to a hearing to review that determination. DHEW also notifies the State Department of Social Services, on the State Data Exchange (SDX) computer tape of its determination. This notification takes from two days to one week. It then generally takes an additional four days to three weeks for

the State to notify the local districts, including New York City, of the determination. New York City then reviews the SDX tape in order to update its Medicaid eligibility files and transmits to the State Medicaid Management Information System the information that the individual is no longer eligible to receive Medical Assistance under the "categorically needy" program. This process generally takes an additional three days to two weeks. After receiving this information, the State Department of Social Services removes the person's Medicaid card, stopping Medicaid benefits. It generally takes from two days to two weeks after receiving the information from New York City for the State to remove this card. Thus, it may take upward of two months after notification by DHEW of SSI ineligibility for the State to terminate Medical Assistance.

6. Under the above-described agreement, it is the State's responsibility to notify SSI recipients of DHEW's Medicaid determinations. Because DHEW's determination that a person is no longer eligible for SSI necessarily results, except in a limited situation described at the end of this affidavit which is not involved in this case, in the determination by DHEW that a person is no longer eligible for Medical Assistance under the "categorically needy" program, the State has directed that local districts to send notices to persons so terminated from SSI that their Medical Assistance, which was contingent on their SSI eligibility, will end with the SSI termination. New York State also requires the local districts to advise these terminated SSI recipients that they may apply for Medical Assistance under the State run "medically needy" program which is described in paragraph 4 above. This notification is to be sent at the time the local district discovers, from the SDX tape, that the individual is no longer categorically eligible for Medicaid. This requirement is set forth on Page 2

of 74 ADM-91 annexed hereto as Exhibit "B". The relevant code numbers on this situation are T 30, N (all other numbers). A suggested notice to be sent out in this situation was attached to 74 ADM-140 annexed hereto as Exhibit "C". The State Department of Social Services has recently been advised that New York City has failed to comply with this requirement and has directed compliance forthwith. On information and belief, there is only one other local social services district which has failed to comply with this requirement.

7. As stated in the notice described above, a person who is no longer categorically eligible for Medical Assistance due to SSI termination, but who still desires Medical Assistance, may apply for such assistance under the "medically needy" program. Application for the medically needy assistance program is made by use of DSS Form 515 (a copy of which is annexed hereto as Exhibit "D"). This is the basic document for use in determining eligibility and verifying required documentation for this program. This procedure is governed by New York State Social Services Law §366(1)(a)(5) under the Title XIX State Plan which has been approved and reviewed by DHEW. The local district must determine the amount of income and resources which is available to the receipent under the criteria set forth in that section. The State cannot assume that a person terminated from the SSI program is eligible for Medical Assistance for the medically needy, since the latter has eligibility requirements which are separate and distinct from the SSI eligibility requirements.

8. When applying for Medical Assistance for the medically needy, a former SSI recipient need not be required to complete and verify all sections of DSS Form 515. Local social services districts should analyze information which

is available through agency records, including the SDX tape, and this information should be compared to the information requested on DSS Form 515. Necessary [information] which is not available must then be requested and verified. The following list of elements, which correspond to sections of DSS Form 515, are not completed or verified by DHEW when it determines SSI eligibility, and so are not available to the local districts from [the] SDX tape.

SECTION OF DSS-515

E. Institutionalized

F. Pregnant

K. Living Arrangement
(If spouse, or children under 21)

L. Employment—If Spouse Employed

M. Wage Information—If Spouse Employed

Q. Spouse Elsewhere

R. Parents of Children Living Elsewhere

T. Resources

U. Other Property

V. Transfer of Property

W. Medicare

X. Health Insurance
Medicare Release Signature
Signature

9. Under federal law, there is an exception to the general rule that persons who are no longer eligible for SSI are also no longer categorically needy for the purpose of receiving Medical Assistance. The exception is for those persons who were in receipt of SSI but became financially

ineligible [therefor] due to a cost-of-living increase in Old Age Survivors Disability Insurance benefits provided under Title II of the Social Security Act (OASDI) (42 USC §401 et seq). These persons remain categorically needy for the purpose of receiving Medical Assistance, and so their Medical Assistance is not terminated when they become ineligible for SSI.

10. Cost of living increases under the Title II OASDI program were granted on July 1, 1977 and July 1, 1978. Those persons who became financially ineligible for SSI due to this increase received SSI termination notices from DHEW at the end of May 1977 and May 1978, however, their Medical Assistance continues.

11. Cost-of-living increases, which were granted on July 1, 1977 and July 1, 1978, are not the only reasons why benefits under Title II may be increased, and increases for other reasons may occur at any time. However, if a person becomes financially ineligible for SSI due to an increase in Title II benefits, a person would only remain categorically needy for the purpose of receiving [M]edical [A]ssistance if the reason for the increase in Title II benefits was a cost-of-living increase.

WHEREFORE, your dependent respectfully requests that the Court deny plaintiffs' motion for a preliminary injunction and grant such other and further relief as may be appropriate.

/s/ RICHARD T. CODY

RICHARD T. CODY

[Jurat Omitted]

Plaintiff's Notice of Cross-Motion for Summary Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

SIRS:

PLEASE TAKE NOTICE that upon the plaintiff's Statement Pursuant to Rule 9(g), the affidavits of Ann Moynihan, Marshall Green, Paula Galowitz, Catherine Cotter, and Gertrude Weider, the plaintiff's memorandum of law in support of this motion and all the prior proceedings and papers herein, the plaintiff will move this Court at a motion term to be held at the United States Courthouse, Room 905, Foley Square, New York, New York, on the 20th day of April 1979, at 2:00 P.M., or as soon thereafter as counsel can be heard,

1. for an order pursuant to Rule 56 of the Federal Rules of Civil Procedure, granting summary judgment in favor of the named plaintiffs, proposed plaintiff intervenors and plaintiff class declaring unconstitutional as violative of the Fifth and Fourteenth Amendments to the United States Constitution and as invalid under the Social Security Act, the defendants' practice of

(a) automatically discontinuing Medicaid benefits to individuals found no longer eligible for SSI without making a determination as to the eligibility of those individuals for Medicaid benefits; (b) terminating Medicaid benefits to individuals found no longer eligible for SSI without timely and adequate notice of the termination and without provid-

ing a pretermination hearing at which defendants must establish and the recipient may contest the grounds for termination of benefits, on the grounds that there is no genuine issue as to any fact material to this case and that the plaintiffs are entitled to judgment as a matter of law; and

2. for an order pursuant to Rule 65 of the Federal Rules of Civil Procedure granting a permanent injunction permanently requiring defendant, their officers, agent[s], servants, employees and successors in office to restore Medicaid benefits to named plaintiff, proposed plaintiff/intervenors and members of her class until such time as defendants determine the eligibility for Medicaid of class members on an individual basis and until such time as class members are given timely and adequate notice of the proposed termination of their Medicaid benefits and given the opportunity to have a pretermination evidentiary hearing at which defendants must establish and recipients may contest the grounds for termination; and granting such other and further relief as to this Court may seem just and proper.

Dated: New York, New York
April 13, 1979

Yours etc.,

KALMAN FINKEL, ESQ.
Attorney-in-charge
Civil Division

• • •

Plaintiff's 9(g) Statement

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

Pursuant to Rule 9(g) of the General Rules of this Court, plaintiff contends that the following material facts are not in dispute.

1. Plaintiff, proposed plaintiff/intervenors and members [of] plaintiff class (hereinafter referred to as plaintiffs) are present and former S.S.I. and Medicaid recipients who have been notified that their S.S.I. benefits were being terminated but who did not receive either timely and adequate notice of the termination of their Medicaid benefits prior to termination or an opportunity for a hearing, at any time, at which the defendants (or either one of them) would establish plaintiffs ineligibility for Medicaid or at which plaintiffs could contest the defendants' termination of their Medicaid eligibility.

2. None of the defendants provide plaintiffs with timely and adequate notice of the termination of their Medicaid benefits or with the opportunity for a pre-termination hearing at which defendants must establish and plaintiffs can contest their ineligibility for Medicaid.

3. None of the defendants make a determination concerning plaintiffs eligibility for Medicaid independently of their ineligibility for S.S.I.

4. None of the defendants advise plaintiffs that their Medicaid benefits will cease or have ceased.

Plaintiff's 9(g) Statement

5. The notice that the plaintiffs received from H.E.W. only stated that "For information about any change in your Medicaid eligibility caused by this action you should get in touch with your local social services agency". The notice did not state that there was a change in Medicaid eligibility nor did it advise plaintiffs about any appeal rights with respect to any Medicaid termination.

6. The state defendant does not mandate that the City defendant advise former S.S.I. recipients that their Medicaid benefits will cease.

7. Plaintiffs may remain eligible for Medicaid benefits, under the Medicaid program, in spite of the termination of their eligibility for S.S.I. benefits.

8. The State and City defendants operate a single, uniform Medicaid program with numerous criteria for eligibility.

9. At the time of the initiation of this lawsuit:

a) Plaintiff Ellen Stenson, 77 years old widow lived alone at 131 Jersey Street, Staten Island, New York.

b) Her only source of income [was] Social Security payments of $220.00 per month and a pension of $107.00 per month.

c) Mrs. Stenson was covered by the Medicaid Program when she applied for and became eligible for Supplemental Security Income benefits. (S.S.I.).

d) Mrs. Stenson received a notice dated July 3, 1978, from the Department of Health, Education and Welfare stating that her S.S.I. benefits were being terminated because of a change in her income. The notice did not say

that her Medicaid benefits were also being terminated, but merely stated:

> FOR INFORMATION ABOUT ANY CHANGE IN YOUR MEDICAID ELIGIBILITY CAUSED BY THIS ACTION YOU SHOULD GET IN TOUCH WITH YOUR LOCAL SOCIAL SERVICES AGENCY.

e) In November 1978 Mrs. Stenson did not receive a Medicaid card.

f) She did not receive notification that her Medicaid coverage was being terminated nor was she informed that she had a right to have a hearing before her Medicaid benefits were cutoff.

g) Mrs. Stenson re-applied for Medicaid.

h) There was no mechanism in the Medicaid program by which Mrs. Stenson could be given an emergency Medicaid card to cover housekeeping services pending a decision on her application.

i) Mrs. Stenson continued to receive Medicaid pursuant to the defendants' stipulation in this lawsuit to provide Medicaid benefits; [s]he was found eligible for Medicaid by the City defendant in January, 1979.

Dorothy Wilson

10. Proposed intervenor Dorothy Wilson is a fifty-seven year old woman who resides at 1084 Nostrand Avenue, Brooklyn, New York.

11. Ms. Wilson's only source of income is Social Security disability benefits in the sum of $254.30.

12. Ms. Wilson had been receiving Supplemental Security Income payments because of her disability. She was notified in February that her Supplemental Security In-

come payments were being stopped because she was found eligible to receive Social Security disability payments in the amount of $254.30 monthly. The notice she received about her SSI in February did not tell her that her Medicaid benefits were being stopped. The notice simply said: "For information about any change in your Medicaid eligibility caused by this action you should get in touch with your local social services agency."

13. Ms. Wilson was never notified that her Medicaid coverage was being terminated or was about to be imminently terminated and was never informed that she had a right to have a hearing before her Medicaid benefits were cut-off.

14. Ms. Wilson is presently receiving Medicaid coverage as a result of the defendant[s'] stipulation in his lawsuit to provide such coverage.

15. Ms. Wilson has initiated the process of re-applying for Medicaid.

Michael Murtagh

16. Proposed intervenor Michael Murtagh who resides at 35 Holland Avenue, Staten Island, New York, has as his sole source of income Social Security Disability benefits in the sum of $322.30 and aid-continuing SSI benefits.

17. Prior to January 1974, Mr. Murtagh was a recipient of benefits in the State administered program of Aid to Aged, Blind and Disabled (AABD) and he also received Medicaid coverage. In or about January 1974, his case was converted from the AABD program to the federal SSI program. As a recipient of SSI, he all times received a Medicard card and Medicaid benefits.

Plaintiff's 9(g) Statement

18. On or about September 29, 1978, the Social Security Administration informed Mr. Murtagh that his SSI benefits would cease because of the fact that changes in his income, which consists solely of Social Security benefits, rendered him ineligible for SSI. Said "Notice of Planned Action" further provided: "For information about any change in your Medicaid eligibility caused by this action you should get in touch with your local social services agency."

19. In November, 1978, Mr. Murtagh did not receive his Medicaid card[.]

20. Mr. Murtagh has received no written notice that his Medicaid benefits have been terminated, nor has he received notice of his right to a fair hearing and to aid continuing pending a fair hearing.

21. Prior to November 1973, Medicaid paid Mr. Murtagh['s] medical insurance premiums for Medicare. By Notice dated November 6, 1978, he was informed that these premiums would no longer be paid for and that these premiums would be deducted from his Social Security Disability benefits. Since November 1978, his Social Security benefits have been reduced by $8.50 monthly to reflect the cost of such premiums previously paid by Medicaid.

22. Mr. Murtagh had his Medicaid card re-issued in 1978 as a result of his appeal of the SSI decision.

23. Mr. Murtagh received an interim Medicaid authorization in February, 1979 effective through February 28, 1979 although the records of the City defendant's Medicaid office showed that he was no longer eligible for Medicaid as of January 17, 1979.

Plaintiff's 9(g) Statement

24. The defendants [in] this lawsuit have stipulated to continue to provide Medicaid coverage to Mr. Murtagh pending the determination of the motion for [a] preliminary injunction.

25. As of April 11, 1979, Mr. Murtagh is receiving aid continuing SSI benefits pending the determination of his SSI appeal.

Pursuant to Rule 9(g) of the General Rules of this Court, plaintiff contends that the following facts are in dispute but not material:

1. It is the practice of defendant HEW to notify the State defendant of its determination of SSI ineligibility at about the same time that it notifies the SSI recipient.

Dated: New York, New York
April 12, 1979

Kalman A. Finkel
The Legal Aid Society
Attorney for Plaintiffs

By /s/ Ann Moynihan

Ann Moynihan

Affidavit of Ann Moynihan in Support of Cross-Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 78 Civ. 6044 (RWS)

ELLEN STENSON,

Plaintiff,

and

MICHAEL MURTAGH and DOROTHY WILSON,

Plaintiff/Intervenors,

against

BARBARA BLUM, *et al.*,

Defendants.

State of New York)
County of New York) ss.:

ANN MOYNIHAN, being duly sworn, deposes and says:

1. I make this Affidavit in support of plaintiff and proposed plaintiff/intervenors' motion for summary judgment, and in opposition to the State defendants' motion for summary judgment, and the Federal and City defendants' motion to dismiss.

2. I am an attorney with The Legal Aid Society, 42 Richmond Terrace, Staten Island, New York.

3. Attached hereto are the following:

A. The face page of an SSI application form.

B. Part 4-30-20 from HEW's Medical Assistance Manual on continual Medicaid coverage provisions.

C. An HEW Instruction to SRS Regional Commissioners on State Responsibilities for Notification to Recipients.

D. Excerpts from the Desk Reference Guide For Medical Assistance Eligibility.

E. The affidavits of Gertrude Wieder, dated December 20, 1978; Joseph Ronan, dated December 21, 1978 and Charles W. Nordin, M.D., dated December 15, 1978, submitted in the case *Wieder* v. *Blum*, Civ. Action No. 78 Civ. 6081 (SDNY).

F. The affidavit of Catherine Cotter, dated April 1, 1979.

G. The affidavit of Marshall Green, dated April 13, 1979.

H. The affidavit of Paula Galowitz, dated April 9, 1979.

I. The affidavit of Ann Moynihan, dated April 13, 1979.

/s/ ANN MOYNIHAN

ANN MOYNIHAN

[Jurat Omitted.]

Affidavit of Catherine Cotter

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

78 Civ. 6044 (R.W.S.)

ELLEN STENSON, individually and on behalf of all other persons similarly situated,

Plaintiff

against

BARBARA BLUM, individually and in her capacity as Commissioner of the New York State Department of Social Services, BLANCH BERNSTEIN, individually and in her capacity as Commissioner of the New York City Department of Social Services, and JOSEPH CALIFANO, Secretary of the Department of Health, Education and Welfare, individually and as Sec'y,

Defendants.

CATHERINE COTTER, being duly sworn, deposes and says:

1. I make this affidavit in support of plaintiff's and proposed plaintiff intervenors' motions for class certification and a class-wide preliminary injunction.

2. I live at 8 Garden Place, Brooklyn, New York, and receive Social Security Disability Benefits in the amount of $274.90 per month. I am presently on Medicaid.

Affidavit of Catherine Cotter

3. In the [s]pring of 1976 I was receiving Social Security Disability benefits and Supplemental Security Income. My Social Security Disability benefit payments were increased in May 1976 to $235.80 per month, which rendered me ineligible for SSI payments.

4. I was notified by the Social Security Administration that my SSI benefits were being terminated.

5. I was not notified, however, that my medicaid benefits, which I had been receiving while on SSI were being terminated. I received no notice telling me that I had a right to contest the termination of my medicaid benefits or had the right to aid continuing pending that h ring. I was not told that I had a right to prove my con nuing eligibility for medicaid.

6. I did not receive my medicaid card in June of 1976.

7. My medicaid card was critically important to me at the time, as it is now. I recei Social Security Disability benefits because I suffer from lupus, an "autoimmune" disease which causes my body tissue to attack itself. As a result of the lupus, I suffer from kidney disease, arthritis, and numerous skin irritations. I take daily medication including prednisone and immuran. This medication, in turn, renders me susceptible to a large range of infections. The overall effect of the disease is to render me lethargic and continually suffering from a number of debilitating illnesses. I am thirty years old.

8. I regularly attend a clinic for treatment of the lupus, and did so in 1976. Each visit involves laboratory tests and renewal of medication subscriptions. My monthly medical expenses range between $100 and $125, and did so in 1976 when my medicaid was terminated.

9. I had no other source of income when my benefits were terminated, and my total assets consisted of a retroactive Social Security Disability award of $1,212.00, which I received in May 1976 and spent quickly to meet pressing debts.

10. I believe that I was eligible for medicaid when my benefits were terminated.

11. I immediately attempted to reapply for medicaid benefits in June of 1976.

12. A medicaid card was essential if I was to continue receiving treatment.

13. The only way that I continued to receive medical treatment was that I continually reassured the clinic personnel that I was reapplying for medicaid and that I was eligible. Because they knew me, and knew my need for medication and treatment, they allowed me to continue attending the clinic, which is the Lupus Clinic at Montefiore Hospital, Bronx, New York.

14. In fact, I was not sure that I could re-obtain my medicaid benefits, and spent an anxiety-ridden period attempting to re-apply for medicaid. I was unable to get my benefits reinstated until September 1976, a full three months after my medicaid card failed to come.

15. The delay in receiving my benefits was not the result of my failing to obtain them. In the summer of 1976 I literally spent 10 or more days in medicaid centers trying to process my application. When I first went in to reapply for medicaid I was told that no new applications for medicaid would be accepted for six months.

16. I became very upset at the prospect of not being able to obtain medical treatment, and immediately went to the social worker at the center where I was being treated. The social worker made some calls and was able to make an appointment for me, but I had to wait about a month before I could fill out the application.

17. I cannot really explain to this court the incredible pressure that I felt when I had to deal with the combination of the debilitating effects of lupus and also try to deal with the medicaid bureaucracy in New York City, which appeared to me at the time to be placing roadblock after roadblock in the way of my obtaining medicaid benefits.

18. I am a college graduate who has completed one year of law school, and yet it took a summer-long struggle for me to obtain medicaid, even though my disability was clearly established and my only source of income was Social Security Disability.

19. If had been advised of the right to a fair hearing, I would have requested one because I believe now, and believed in June of 1976, that I continued to be eligible for Medicaid. My belief was vindicated when I was finally reaccepted for the program in September 1976.

20. If the social worker at the clinic had not intervened to obtain an application appointment for me, I would have had to wait six months for an application appointment (according to the worker who advised me at the Bronx Center where I initially applied in June). I would therefore have incurred liability for my medical bills for three months in the sumer of 1976 since the medicaid program only covers bills for three months prior to the date of acceptance into the program.

21. I therefore believe that this court should enjoin the defendants in this action from summarily terminating medicaid benefits to individuals who have been found ineligible for SSI without redetermining [their] eligibility and without giving them timely and adequate notice prior to the termination of their medicaid.

Brooklyn, New York.

/s/ CATHERINE COTTER

CATHERINE COTTER

Sworn to before me this
1st day of April 1979.

/s/ ANN MOYNIHAN

Notary
Kings Co., 24-4677122
Term expires 3/30/80.
Ann M. Moynihan

Affidavit of Paula Galowitz in Support of Cross-Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 78 Civ. 6044 (RWS)

ELLEN STENSON, et al.,

Plaintiffs,

and

MICHAEL MURTAGH, et al.,

Plaintiff/Intervenor,

against

BARBARA BLUM, et al.,

Defendants.

State of New York)
County of New York) ss.:

PAULA GALOWITZ, being duly sworn, deposes and says:

1. I am an attorney duly admitted to practice in this Court, and am of counsel to MORTON B. DICKER, ESQ., THE LEGAL AID SOCIETY, 11 Park Place, New York, New York, attorney for the proposed plaintiff/intervenor Dorothy Wilson.

2. I had previously advised Ms. Wilson to re-apply for Medicaid. Ms. Wilson did not understand why she had to apply and thought she was still eligible.

3. From the information Ms. Wilson has given me, it appears to me that she continues to be eligible for Medicaid. She has told me that her daughter and two grandchildren with whom she lives are receiving Medicaid. Her sole source of income is Social Security disability benefits of $254.30 monthly, which I believe to be below the Medicaid income limits. If Ms. Wilson were living alone, she would still be eligible for SSI, due to the different payment amounts for living alone or for living with others.

4. On or about April 5, 1979, I spoke with Ms. Wilson. She informed me that she had called the Medicaid office on West 34th Street, Manhattan many times and she was told to go to that office to apply (there is no listing in the telephone book for a Medicaid office in Brooklyn). Ms. Wilson informed me that it would be difficult for her to travel to West 34th Street, Manhattan because of her disability. Ms. Wilson had her daughter call Medicaid for her and was told they would mail Ms. Wilson an application. Ms. Wilson had not yet received the application.

5. Ms. Wilson told me that she did not receive her regular Medicaid card for April, 1979. Instead she received a large sheet of paper, called "CS-19", a temporary Medicaid authorization card, effective until April 28, 1979.

6. Upon information and belief, the fact that Ms. Wilson did not receive a regular Medicaid card for April 1979 indicates that she is no longer on the computer rolls, has been terminated from Medicaid and only got the temporary authorization for Medicaid until April 28, 1979 as a direct result of the stipulation in this litigation.

/s/ PAULA GALOWITZ

PAULA GALOWITZ

[Jurat Omitted]

(Second) Affidavit of Ann Moynihan in Support of Plaintiff's Cross-Motion for Summary Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 78 Civ. 6044 (RWS)

ELLEN STENSON,

Plaintiff,

and

MICHAEL MURTAGH and DOROTHY WILSON,

Plaintiff/Intervenors,

against

BARBARA BLUM, *et al.*,

Defendants.

State of New York)
County of New York) ss.:

ANN MOYNIHAN, being duly sworn, deposes and says:

1. I make this affidavit in support of plaintiff and proposed plaintiff/intervenors' motion for summary judgment, and in opposition to the State defendants' motion for summary judgment, and the Federal and City defendants' motion to dismiss.

2. I am an attorney with The Legal Aid Society, 42 Richmond Terrace, Staten Island, New York.

(Second) Affidavit of Ann Moynihan in Support of Cross-Motion

3. I have represented plaintiff ELLEN STENSON and proposed plaintiff/intervenor MICHAEL MURTAGH in connection with the termination of their Medicaid benefits.

4. In January 1979, I was informed by the New York City Department of Social Services that M[s]. STENSON's application for Medicaid had been processed and that she was accepted for Medicaid on a "spenddown basis." Ms. STENSON would have to pay approximately $21.00 per month toward her medical expenses, and the rest would be covered by Medicaid.

5. In early March 1979, I was informed by Ms. Granberg, who is M[s]. STENSON's housekeeper, that M[s]. STENSON had to be admitted to the U. S. Public Service Hospital in Staten Island. Her admission was precipitated by a series of falls she had suffered while she was unattended. (Ms. Granberg worked for Ms. STENSON for only 12 hours per week). Ms. Granberg informed me that on a number of occasions, the police had to be called to provide M[s]. STENSON with assistance.

6. I subsequently spoke to two social workers at the hospital to determine when M[s]. STENSON woud be returning home. I was advised that the doctors were recommending that M[s]. STENSON be transferred to a nursing home.

7. I explained to the social workers that M[s]. STENSON would prefer to return home with 24 hour home care, and have asked that this be considered in light of M[s]. STENSON's present physical condition.

8. No final decision in this matter has been reached, and M[s]. STENSON's apartment is being maintained.

(Second) Affidavit of Ann Moynihan in Support of Cross-Motion

9. As to proposed plaintiff/intervenor MICHAEL MURTAGH, I was present when Mr. Newman of the Social Security Administration agreed to reinstate S.S.I. benefits to M[R]. [MURTAGH] pending a reconsideration of the termination of his benefits. A reconsideration was held on April 10, 1979 but no decision has yet been received.

/s/ ANN MOYNIHAN

ANN MOYNIHAN

Sworn to before me this
13th day of April, 1979

/s/ ARTHUR J. FRIED

Arthur J. Fried
Notary Public
ARTHUR J. FRIED
Notary Public State of New York
No. 31 (illegible)

State Defendant's Statement in Response to Plaintiff's 9(g) Statement

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

Pursuant to Rule 9(g) of the General Rules of this Court, the State defendant contends that the following material facts are in dispute:

1. "None of the defendants advise plaintiffs that their medicaid benefits will cease or have ceased" (¶ 4 of plaintiff's 9[g] statement). The State requires the local districts to advise SSI recipients that their [M]edicaid eligibility will cease when their SSI benefits are terminated. See 74 ADM-91, annexed as Exhibit "B" to the affidavit of Richard T. Cody, previously submitted to this Court. Proposed intervenor Wilson was in fact notified by the City defendant that her medicaid would terminate when, following the instructions of the SSI termination notice sent by HEW, her attorney called the City defendant for information regarding Wilson's medicaid status. See ¶ 38 of Ms. Wilson's proposed complaint.

2. "The State does not mandate that the City defendant advise former SSI recipients that their Medicaid benefits will cease." (¶ 6 of plaintiff's 9 [g] statement.) See above response.

3. "Ms. Wilson was never notified that her Medicaid coverage was being terminated or was about to be immedi-

ately terminated." (¶ 13 of plaintiff's 9[g] statement). See response in ¶ 1 above.

Dated: New York, New York
April 24, 1979

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Defendant Blum

By _____

MARION BUCHBINDER
Assistant Attorney General
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-3023

September 18, 1979 Opinion on Class Certification, Intervention, and Summary Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

78 Civ. 6044 (RWS)

ELLEN STENSON, individually and on behalf of all other persons similarly situated,

Plaintiff,

vs.

BARBARA BLUM, individually, and in her capacity as Commissioner of the New York State Department of Social Services, BLANCHE BERNSTEIN, individually and in her capacity as Commissioner of the New York City Department of Social Services, and JOSEPH CALIFANO, JR., Secretary of the Department of Health, Education and Welfare, individually and as Secretary,

Defendants.

APPEARANCES:

THE LEGAL AID SOCIETY
Attorneys for Plaintiff and Intervenors
11 Park Place
New York, New York 10007

ROBERT ABRAMS, ESQ.
Attorney General of the State of New York
Attorney for Defendant Blum
Two World Trade Center
New York, New York 1004[7]
By: Marion R. Buchbinder, Esq.
Of Counsel

September 18, 1979 Opinion on Class Certification, Intervention, and Summary Judgment

JOSEPH M. ARMSTRONG, ESQ.
Special Assistant Corp. Counsel
Attorney for Defendant Bernstein
220 Church Street
New York, New York 10013
By: Henry M. Adler, Esq.
Of Counsel

ROBERT B. FISKE, JR., ESQ.
United States Attorney for the
Southern District of New York
Attorney for Defendant Califano, Jr.
One St. Andrews Plaza
New York, New York 10007
By: Thomas D. Warren, Esq.
Sherry J. Leiwant, Esq.
Of Counsel

SWEET, D. J.

Plaintiff Ellen Stenson ("Stenson") has moved individually and on behalf of other persons similarly situated, for declaratory and injunctive relief against Barbara Blum, individually and in her capacity as Commissioner of the New York State Department of Social Services ("State defendant"), Blanche Bernstein, individually and in her former capacity as Commissioner of the New York City Department of Social Services ("City defendant"), and Joseph Califano, former Secretary of the Department of Health, Education and Welfare ("HEW"), individually and in his capacity as Secretary ("Federal defendant" or "Secretary"). Stenson seeks a declaratory judgment that termination of her Medicaid benefits without notice and opportunity for a hearing and without an *ex parte* determination of eligibility for Medicaid benefits independent of her eligibility for Supplemental Security Income ("SSI")

violates the Social Security Act and regulations promulgated thereunder and also the Fifth and Fourteenth Amendments to the United States Constitution.[1] Stenson also seeks class-wide injunctive relief providing that Medicare benefits of individuals whose SSI payments have been terminated may not be suspended until their eligibility is redetermined and, if they are found to be ineligible, until they have received notice and an opportunity for a hearing.

Finally, plaintiff seeks: (a) compensatory damages for out-of-pocket medical expenses resulting from her termination from Medicaid; (b) compensatory damages for emotional distress; (c) punitive damages; and (d) attorney's fees.

The case is now before this court on Stenson's motion for summary judgment pursuant to Rule 56, Fed.R.Civ.P., State and Federal defendants' cross-motions for summary judgment pursuant to Rule 56, Fed.R.Civ.P. and City defendant's motion to dismiss[2] pursuant to Rule 12, Fed.R.

1. Because resolution of Stenson's claim is based on statutory grounds, it is inappropriate to resolve her constitutional claim. A district court should decline to adjudicate constitutional claims if the controversy can be resolved on statutory grounds. Thus, in *Hagans* v. *Lavine*, 415 U.S. 528, 543 (1973), the Supreme Court stated that "the latter [statutory] claim was to be decided first and the former [Constitutional] claim not reached if the statutory claim was dispositive;" *See Rosado* v. *Wyman*, 397 U.S. 402 (1967); *King* v. *Smith*, 392 U.S. 309, 313, 332-334 (1967); *cf. County Court of Ulster County* v. *Allen*, —— U.S. ——, 99 S. Ct. 2213, 2223 (1979). While the court recognizes that Stenson states a claim under the Constitution, this opinion will refer only to her claims under the Social Security Act and regulations promulgated thereunder.

2. Stenson originally moved for a temporary restraining order requiring the defendants to provide her with continued Medicaid benefits pending resolution of her motions for a preliminary injunction and class certification. Federal defendant then cross-moved pursuant to Rule 12(c), Fed.R.Civ.P., for judgment on the pleadings, State defendant moved for summary judgment and City defendant moved, pursuant to Rule 21, Fed.R.Civ.P., to be dropped as a defendant. Stenson in response, cross-moved for summary judgment, whereupon Federal defendant also cross-moved for summary judgment.

September 18, 1979 Opinion on Class Certification, Intervention, and Summary Judgment

Civ.P. For the reasons stated below, Stenson's motion is granted in part and denied in part; Federal and City defendants' motions are granted in whole; and State defendant's motion is denied in part and granted in part.

Stenson is a former recipient of benefits under the Federal SSI program, 42 U.S.C. §1381(1976). Because she was at one time eligible to receive SSI benefits, she was then categorically eligible to receive benefits under New York State's Medicaid program. New York Social Services Law §363 *et. seq.* (McKinney's 1976). In July, 1978, Stenson was determined by the Department of HEW to be ineligible for SSI benefits. She received a notice from HEW informing her of her ineligibility and directing that any inquiries concerning continued Medicaid coverage be directed to her local Social Services Agency. Shortly thereafter, Stenson's Medicaid benefits were terminated without receipt of notice from the State and without an opportunity for a hearing. Subsequent to that termination, State defendant agreed to restore Stenson's Medicaid benefits pending resolution of this action.

On March 20, 1979, Michael Murtagh ("Murtagh") and Dorothy Wilson ("Wilson") moved to intervene as plaintiffs. Murtagh is a former recipient of Medicaid whose eligibility resulted from his eligibility for SSI. Following his termination from SSI, Murtagh, although continuing to receive a monthly Medicaid card from New York State, was orally informed that his Medicaid eligibility had been terminated and that his card would no longer be valid. Pending resolution of his request for a hearing concerning the termination of his SSI benefits, Murtagh has received a temporary Medicaid card. Like Murtagh, Wilson is a former recipient of Medicaid as a consequence of her eligibility for SSI. When her SSI payments were terminated by the Federal government because she had become eligible to receive Social Security disability benefits, she received

a notice similar to that sent to Stenson and Murtagh regarding termination of SSI benefits. Wilson, however, received neither notice nor an opportunity for a hearing upon her termination from Medicaid. Like Stenson, Wilson has received a temporary Medicaid card from the State pending resolution of this litigation.

Statutory/Regulatory Scheme

Title XIX of the Social Security Act, which set up the Medicaid program, was enacted in 1966 to improve state programs of medical assistance to the needy by providing additional Federal funding. Pursuant to 42 U.S.C. §1396b, HEW offers Federal reimbursement to a participating state for a specified percentage of that state's cost of providing medical assistance under a federally approved state plan. Applicable Federal statutory provisions set forth two general groups of individuals who are eligible for such medical assistance. The first group is comprised of individuals as to whom the state is required, pursuant to 42 U.S.C. §1396 (a)(10)(A), to extend Medicaid coverage. These individuals are defined to be "categorically needy."[3] Recipients of SSI[4] benefits are included within the mandatory Medicaid coverage available to persons classified as categorically needy. The second group is comprised of individuals who may, at the state's option, be included in the state's Medi-

3. Under 42 C.F.R. §435.4 (1979) the "categorically needy" category is defined to include "aged, blind or disabled individuals or families and children who are otherwise eligible for medicaid and who meet the financial eligibility requirements for [Aid to Families with Dependent Children], SSI or an optional stake [sic] supplement."

4. SSI is a Federally administered program under which aged, blind, and disabled individuals with income and resources below a specified level receive monthly payments from the Federal Government. When the Secretary of HEW determines that a recipient has become ineligible for SSI, notice of such determination, along with notice of the individual's right to appeal, are sent to that individual. 42 U.S.C. §1383(c)(1976); 42 C.F.R. §§416.1403-05(1978).

caid program. 42 U.S.C. §1396a(a)(10)(c). These individuals are defined to be "medically needy."[5] Unlike a categorically needy individual under Federal regulations, a person who is medically needy is not eligible for Medicaid unless his medical expenses, when subtracted from his total income, yield a figure that is less than a ceiling specified by HEW. If such is the case, the individual will be reimbursed for his medical expenses until his income reaches the ceiling limit. At this point the individual must pay the balance of his expenses. New York State's Medicaid plan provides for aid to both categorically needy and medically needy individuals. New York Social Services Law §366 (1)(a)-(e)(McKinney's 1976).

New York State has entered into an agreement with the Secretary of HEW (pursuant to New York Social Services Law §363-b) under which the Secretary determines Medicaid eligibility for certain individuals, including SSI recipients, sends notices of his determinations to the State on a timely basis, and notifies the State of changes in the status of these individuals. This arrangement is intended to reduce New York's cost of processing Medicaid applications by having HEW make Medicaid determinations with respect to SSI recipients. *See* [1972] U.S. Code Cong. & Ad. News 4989, 5182. *See generally,* 42 C.F.R. §435.909 (1979).

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5. According to 42 C.F.R. §435.4 (1978) "'Medically needy' means aged, blind, or disabled individuals or families and children who are otherwise eligible for medicaid and whose income and resources are above the limits prescribed for the categorically needy but are within limits set under the Medicaid state plan."

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Class Certification

Pursuant to Rule 23(a),[6] in conjunction with Rule 23(b)(2), Stenson has moved for class certification. The motion is granted. The class will consist of New York State residents who received Medicaid due to their eligibility for SSI and whose Medicaid benefits have been terminated because of subsequent ineligibility for SSI without having received one or more of the following: (a) an *ex parte* determination of continued eligibility for Medicaid, independent of eligibility for SSI; (b) timely and adequate notice of such termination; (c) an opportunity for a hearing.

The class, as herein defined, is "so numerous that joinder of all members is impracticable." Rule 23(a)(1), Fed. R.Civ.P. Stenson asserts, based on Federal defendant Califano's answers to interrogatories, that there are "thousands" of individuals who fit within the specified class. In fact, the actual number of individuals in the class cannot be ascertained with certainty. The answers to interrogatories submitted by Califano, however, indicate the following: at the relevant time, there were 376,890 New York State residents receiving SSI. Between December, 1977 and December, 1978, at least 6,736 New York State residents had benefits terminated, and, in the single month between November, 1978 and December, 1978, a decrease of 1,663 recipients occurred. Based on these figures, the court has determined that the issues raised by Stenson are better resolved by class action suit than by a host of separate

6. Rule 23(a), Fed.R.Civ.Pro., provides:

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is no [sic] numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

actions. *See Hurley* v. *Toia*, 432 F. Supp. 1170, 1174 (S.D. N.Y.), *aff'd without opinion*, 573 F.2d 1291 (2d Cir. 1977).

There are, in addition, "questions of law or fact common to the class." Rule 23(a)(2), Fed.R.Civ.P. Although each member of the class presents a slightly different factual situation, each presents a common legal question: whether the termination of his Medicaid benefits without receipt of an *ex parte* determination of continued eligibility for Medicaid, adequate notice, or an opportunity for a hearing violates the Social Security Act and regulations promulgated thereunder. *See Lyons* v. *Weinberger*, 376 F. Supp. 248, 263 (S.D.N.Y. 1974); 3B *Moore's Federal Practice* ¶ 23.06-1, at 23-176, 23-180 (3d ed. 1978).

Third, Stenson's claims are "typical of the claims" of the class, Rule 23(a)(3), Fed.R.Civ.P., because all class members assert that the manner in which Medicaid benefits are terminated contravenes the Constitution and the Social Security Act.

Fourth, Stenson "fairly and adequately protect[s] the interests of the class." Rule 23(a)(4), Fed.R.Civ.P. The Court of Appeals for this circuit, in *Eisen* v. *Carlisle & Jacquelin*, 391 F.2d 555 (2d Cir. 1968) (Eisen II), articulated various elements which would qualify a party as an adequate representative in a class action. All of these are met in the instant action: counsel for Stenson, the Legal Aid Society, is "qualified, experienced and generally able to conduct the proposed litigation." *Id.* at 562; there is "little likelihood that the litigants are involved in a collusive suit or that plaintiff has interests antagonistic to those of the remainder class," *id.*; and the interest of Stenson, as a representative party, is "co-extensive with the interest of the entire class," *id.*, because all seek to enjoin defendant's actions. *See Bacon* v. *Toia*, 437 F. Supp. 1371, 1381 (S.D.N.Y. 1977), *aff'd*, 580 F.2d 1044 (2d Cir. 1978).

The requirements of Rule 23(b)(2)[7], Fed.R.Civ.P. are also met. The defendants have allegedly denied class members the opportunity to have their continued eligibility for Medicaid reevaluated prior to termination and have failed to provide adequate notice of termination and of the right to a hearing. Although the reasons for the termination of SSI benefits may differ among class members the grounds upon which defendants base their actions are the same. Moreover, because each class member has allegedly been denied the same constitutional and statutory guarantees, the relief here granted is appropriate with respect to the class as a whole.

Federal and State defendants argue that class certification is unnecessary, despite compliance with Rule 23 requirements, because the prospective effect of injunctive relief against government agencies or officers will necessarily inure to the benefit of all class members. This opposition is unconvincing, however. *See, e.g., Rodriguez* v. *Percell*, 391 F. Supp. 38 (S.D.N.Y. 1975); *Percy* v. *Brennan*, 384 F. Supp. 800 (S.D.N.Y. 1974). As one court has remarked: "[I]t seems advisable to cautiously safeguard the interests of the entire class by ensuring that any order runs to the class as a whole. Were this unnecessary, class certification pursuant to Rule 23(b)(2) would arguably, never be necessary."[8] *Mendoza* v. *Lavine*, 72 F.R.D. 520, 523 (S.D.N.Y. 1976).

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7. Rule 23(b)(2), Fed.R.Civ.Pro., provides:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: . . . (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . .

8. Nevertheless, defendants rely on [*Galvin*] v. *Lavine*, 490 F.2d 1255 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974), wherein the court approved a district court's denial of class determination in a

(footnote continued on next page)

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PROPOSED INTERVENTION

This court also has before it Murtagh's and Wilson's motions to intervene pursuant to Rule 24(b), Fed.R.Civ.P.[9] Murtagh and Wilson could be allowed to intervene under the terms of the Rule because like Stenson, both have been terminated from Medicaid benefits because of their termination from the SSI program, allegedly in violation of the Social Security Act. However, although Rule 24(b) should be liberally construed, granting this motion would serve no useful purpose.

Because of the court's broad definition of the class, both Murtagh and Wilson come within the scope of the relief fashioned by the court. *See Hurley* v. *Van Lare*, 365 F. Supp. 186 (S.D.N.Y. 1973), *rev'd on other grounds sub nom. Taylor* v. *Lavine*, 497 F.2d 1203 (2d Cir. 1974), *rev'd. on other grounds sub nom., Van Lare* v. *Hurley*, 421 U.S. 338 (1975), wherein the district court, on facts analogous to those in the case at bar, denied a motion to intervene by individuals who fell within an existing class designation. The court reasoned that "where a suit has been designated a class action, admitting intervenors *who raise now new issues* and who fall within the class merely clutters the action unnecessarily." *Id.* at 196 (emphasis in original). The court stated that granting such a motion "would mean

suit seeking injunctive relief against a State. There, however, denial of class certification was affirmed because the State "made it clear that it understands the judgment to bind it with respect to all claimants; indeed, even before the entry of judgment, it withdrew the challenged policy more fully than the court ultimately decreed and stated it did not intend to reinstate the policy." *Id.* at 1261. In the instant case, however, there has been no similar demonstration by defendants that they will apply a judgment to all persons situated similarly to Stenson.

9. Rule 24(b), Fed.R.Civ.Proc., provides that, "[u]pon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common."

that any member of the class, *ipso facto*, has a right to intervene and litigate the action fully. Such a construction would render class actions just as unmanageable as some are wont to fear them." *Id.*

There is no reason to expand the number of representative party plaintiffs here.[10] The motions by Murtagh and Wilson to intervene are denied.

Failure to Provide Notice and a Hearing

Stenson's first claim is that the State defendant[11] "has violated the Social Security Act[12] and the regulations promulgated thereunder in that they have: (1) failed to provide timely, adequate notice to individuals whose Medicaid assistance has been terminated because of their having been ineligible for SSI; and (2) failed to provide a hearing upon the termination of Medicaid.[13]

The Federal regulations promulgated under the Social Security Act explicitly require a state to provide notice and an opportunity for a hearing. 42 C.F.R. §431.202 (1979). More specifically, a Medicaid recipient whose assistance is to be terminated must be informed by the appro-

10. Some courts have permitted intervention in class actions when applicants raised the same issues as the named plaintiffs on the ground that it makes little difference whether intervention is permitted or denied. *See Groves* v. *Insurance Co. of North America*, 433 F. Supp. 877, 888 (E.D.Pa. 1977); *Epstein* v. *Weiss*, 50 F.R.D. 387 (E.D. La. 1970).

11. In her complaint, plaintiff alleges that Federal and City defendants have also acted in a manner violative of the Social Security Act. Given our disposition, however, there is no need to consider the culpability of the other parties.

12. 42 U.S.C. §§1396 *et. seq.* (1976).

13. *See* footnote 1, *supra*.

priate state agency in writing, at the time of any action affecting his claim, of his right to a hearing, and the notice must contain: "(a)[a] statement of what action the agency intends to take; (b) [t]he reasons for the intended action; (c) [t]he specific regulations that support . . . the action; . . ." 42 C.F.R. §431.210 (1979).[14] Additionally, with limited exceptions, "the state or local agency must mail a notice at least 10 days before the date of the action." 42 C.F.R. §431.211. Finally, the state or local agency must grant an opportunity for a hearing to "[a]ny recipient who requests it because he believes the agency has taken an action erroneously." 42 C.F.R. §431.220(a)(2).

The Federal regulatory requirements must be complied with by participants in the Medicaid program, including New York State. *See Yaretsky* v. *Blum*, No. 78-7077 (2d Cir., Jan. 16, 1979); *Becker* v. *Toia*, 439 F. Supp. 324, 330 (S.D.N.Y. 1977); *Feld* v. *Berger*, 424 F. Supp. 1356 (S.D. N.Y. 1976). To this end New York State itself purports to require that timely and adequate notice be sent to Medicaid recipients informing them of any proposed action to discontinue assistance payments,[15] and of their right, if they so request, to a fair hearing.[16]

Notwithstanding both the Federal and New York State regulations, not all SSI recipients who are about to be terminated are given notice or an opportunity for a hearing. The majority of local New York State agencies merely notifies previously terminated SSI recipients that their Medicaid benefits have been terminated and also that they may reapply for assistance. *See* Affidavit of Ann Moynihan, Attorney for Stenson March 19, 1979. Only a minority

14. The requirements for adequate notice by the state are set forth in 42 C.F.R. §§431.210-14 (1979).

15. *See* 18 N.Y.C.R.R. §358.8.

16. *See* 18 N.Y.C.R.R. §358.4(a)(4). Additional provisions relating to the right to a fair hearing may be found at 18 N.Y.C.R.R. §§358.5-8: 358.10-16.

of agencies sends recipients notice of intent to discontinue Medicaid because of termination from SSI and advises them of their right to a fair hearing. The agency in New York City does not notify Medicaid recipients at all of their proposed terminations. Any such practice which falls short of providing timely and adequate notice and the opportunity for a hearing violates both the letter and the spirit of the Federal and New York State regulations.

The contract between the State and the Secretary, under which the Secretary agrees to determine the Medicaid eligibility of SSI recipients, does not alter the State's obligations in this regard. The Secretary has agreed to make such determinations with respect to individuals who are eligible to receive SSI payments. Nowhere in the contract, however, does the Secretary agree to re-evaluate the eligibility of Medicaid recipients who have been terminated from SSI or to notify terminated SSI recipients that their Medicaid payments have thereby been terminated. Pursuant to HEW regulations, the relevant state responsibilities include termination of medical assistance cards and the issuance of "other notices to individuals within the purview of the agreement."[17] In fact, New York State expressly contracted to "perform such other functions as are necessary to carry out the terms of the agreement." Supplemental Security Income for the Aged, Blind and Disabled Agreement between the Secretary of Health, Education and Welfare and the State of New York ("the Contract"), Article III, Clause D.[18]

17. 20 C.F.R. §416.2107 (1977).

18. The state, as noted in HEW's *Instruction on State Responsibilities for Notification to Recipients*, is responsible for: (i) giving timely and adequate notice of intended action to terminate an individual's Medicaid payments; and (ii) according such individuals the right to a hearing. Although this HEW instruction is not entitled to the same weight as are the regulations it discusses, the instruction nevertheless reflects HEW's intent concerning a state's responsibilities

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The State defendant's assertion that it is relieved of its obligation to provide notice and an opportunity for a hearing, based upon *Hathaway* v. *Mathews*, 546 F.2d 227 (7th Cir. 1976) and *Klein* v. *Mathews*, 430 F. Supp. 1005 (D.N.J. 1977), *aff'd in part*, 586 F.2d 250 (3d Cir. 1978), is misplaced. In neither of the cited cases had the state made a decision to terminate or suspend Medicaid benefits.

In *Hathaway*, a nursing home operator challenged HEW's right to cut off Federal funds to Medicaid patients who resided in the nursing home on the ground that the home was not in compliance with Federal standards without giving the operator an opportunity for a hearing. The State had found the home to be in compliance with applicable Federal standards and had asked HEW to reconsider its decision to stop Medicaid funds to the home. No regulations provided a right to a hearing before Federal financial participation was terminated. In *Klein*, the state and a group of nursing home residents who were Medicaid recipients challenged HEW's termination of Federal financial participation because HEW found the home to be in violation of Federal standards. As in *Hathaway*, the [S]tate requested that HEW reconsider its decision to cut off funds to the home.

Both *Hathaway* and *Klein* involved an HEW decision to stop Federal financial participation. In both cases that decision ran counter to the [S]tate's decision to provide Medicaid funds to the homes in question and the [S]tate was unable to provide relief to the plaintiffs.

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under the contract. *Cf. Friedman* v. *Berger*, 547 F.2d 724 (2d Cir. 1976), *cert. denied*, 430 U.S. 984 (1977), which, in considering the weight to be given to an HEW interpretive memorandum, noted that, "this reasonable view of the statute by an agency entrusted with its execution is 'entitled to considerable deference,'" *id.* at 731 (citing *McGraw* v. *Berger*, 537 F.2d 719, 725 (2d Cir. 1976); *cert. denied*, 429 U.S. 1095 (1977); *New York Department of Social Services* v. *Dublino*, 413 U.S. 405, 421).

By contrast, the Federal government in the case *sub judice* is not seeking to impose a decision on the State and the Medicaid recipient. Rather, the Federal defendant has asserted that HEW makes no determination with respect to a recipient's continued eligibility for Medicaid benefits once SSI has been terminated. *See* §1305 of the SSI Claims Manual attached to Defendant Califano's Supplemental Answer to Plaintiff's First Interrogatories.

Thus, *Klein* and *Hathaway* do not relieve New York State of its responsibility to continue to provide Medicaid benefit to Stenson and members of her class and to provide them with timely and adequate notice in the event a decision is made to terminate such benefits.

That HEW provides a hearing for individuals terminated from SSI does not mean that a state hearing for categorically needy Medicaid recipients would serve no purpose. As an example, under 42 C.F.R. §435.135, a person who becomes financially ineligible for SSI because of a cost of living increase in his Social Security benefits remains eligible to receive Medicaid benefits as a former SSI recipient. *See also,* 42 U.S.C. §1396a (note) (1976).[19] In such

19. 42 U.S.C. §1396a (note) (1976) provides in pertinent part:

> . . . [M]edical assistance under such plan shall be provided to any individual, for any month after June 1977 for which such individual is entitled to a monthly insurance benefit under title II of such Act [subchapter II of this chapter] but is not eligible for benefits under title XVI of such Act [subchapter XVI of this chapter], in like manner and subject to the same terms and conditions as are applicable under such State plan in the case of individuals who are eligible for and receiving benefits under such title XVI [subchapter XVI of this chapter] for such month, if for such month such individual would be (or could become) eligible for benefits under such title XVI [subchapter XVI of this chapter] except for amounts of income received by such individual and his spouse (if any) which are attributable to increases in the level of monthly insurance benefits payable under title II of such Act [subchapter II of this chapter] which have occurred pursuant to [cost of living increases].

a case, a state pre-termination hearing would be necessary to deterine if the individual had been properly terminated from Medicaid. This court recognizes that no hearing is required under the Federal regulations "if the sole issue which would be addressed at a hearing is a Federal or State law requiring an automatic change adversely affecting some or all recipients [of Medicaid]." 42 C.F.R. §431.220 (1979); *see, Schneider* v. *Whaley*, 541 F.2d 916, 918 (2d Cir. 1976) *opinion adhered to*, 548 F.2d 395 (2d Cir. 1976); *Russo* v. *Kirby*, 453 F.2d 548, 551 (2d Cir. 1971); *Viverito* v. *Smith*, 421 F. Supp. 1305, 1308 (S.D.N.Y. 1976). Where, however, the central issue is whether an individual should remain eligible for Medicaid despite termination from SSI, granting an opportunity for a state hearing is essential.

Stenson also contends that the Social Security Act and regulations promulgated thereunder require New York State[20] to continue to pay Medicaid benefits to individuals in the defined class until New York State makes an *ex parte* determination of the class members' continued eligibility for Medicaid,[21] and further that if an *ex parte* decision is made to terminate an individual, payments must continue until notice and an opportunity for a hearing are given.

There is no one section in the Federal [Social Security Act] and New York State Social [Services Law] which is dispositive of the question of when payment of benefits may be stopped. Many of the Federal regulations relating to whether Medicaid payments should continue pending redetermination of eligibility are applicable to a recipient who previously has been eligible for Medicaid under any of the

20. *See* footnote 1, *supra*.

21. At this *ex parte* determination, at which the individual need not be present, the State would reconsider whether the individual is still eligible for Medicaid notwithstanding his termination from SSI. If the State determines that such individual is still eligible for Medicaid, albeit for a reason other than his status as an SSI recipient, then the State must continue to make Medicaid payments.

categories of the New York State Social [Services Law], including the SSI category. For example, 42 C.F.R. §435.916(c) (1979) provides that "[t]he [state] agency must promptly redetermine eligibility when it receives information about changes in a recipient's circumstances that may affect his eligibility."[22] Another example is 42 C.F.R. §435.930(b) (1979), which mandates that the appropriate state agency "[c]ontinue to furnish Medicaid regularly to all eligible individuals until they are found to be ineligible." As applied to the issue *sub judice*, these regulations require that upon receipt of HEW notification that an individual has been terminated from the SSI program,[23] New York must reconsider the recipient's eligibility for Medicaid. Pending this *ex parte* determination, New York must continue to furnish such individuals with medical assistance.[24]

A third relevant regulation is 42 C.F.R. §435.1003 (1979) which provides for continued Federal assistance to a [S]tate's Medicaid program for a period of time following Federal notification to the [S]tate that a recipient has been determined ineligible for SSI.[25] The regulation also pro-

22. *See* page 14, *infra*.

23. Such notification qualifies as a report indicating changes in the individual's circumstances within the meaning of 42 C.F.R. §435.916(c) (1978).

24. As we hold *infra*. at p. 13 if the individual is determined ineligible for Medicaid and he requests a hearing within ten days of mailing of notice of termination, payments must continue pending resolution of the issues raised at such hearing.

25. 44 Fed. Reg. 17,933 (1979) (to be codified at 42 C.F.R. §435.1003[a]) provides that if SSA notifies a state agency that an individual has been determined ineligible for SSI, Federal assistance to the state continues as follows:

> (1) If the agency receives the SSA notice by the 10th day of the month, FFP [Federal assistance] is available under this section only through the end of the month unless the recipient requests a hearing under Subpart E, Part 431 of this subchapter.

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vides that "the [state] agency must take prompt action to determine eligibility after receiving the SSA notice."

Many of the regulations now codified in Title 42 of the Code of Federal Regulations were previously contained in Title 45. For example, 45 C.F.R. §248.4(b)(7) (1977) (recodified at 42 C.F.R. §435.1003 [1978]), states that the purpose of providing continued Federal assistance to a [S]tate following termination of a recipient's SSI benefits is to enable the [S]tate "to determine whether he [the recipient] is still eligible for Medicaid and to allow for notification by the state to such individual of his ineligibility for medical assistance." Although this language was not explicitly included in the recodification of Title 42, HEW has unambiguously stated that the redesignated regulations merely clarify, without substantive change, the same policies contained in Title 45.[26] Furthermore, HEW's own interpretations of 45 C.F.R. §248.4(b)(7) reveal that HEW views the purpose of this as being to allow a [S]tate:

> sufficient time to determine whether the individual may still be eligible for Medicaid (*e.g. as medically*

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(2) If the agency receives the SSA notice after the 10th day of the month, FFP is available only through the end of the following month, unless the recipient requests a hearing under Subpart E, Part 431 of this chapter.

(3) If a recipient requests a hearing, FFP is available as specified in Subpart E, Part 431 of this subchapter.

The Federal regulations also provide for reimbursement of state expenses incurred when a terminated recipient's payments are continued upon requesting a hearing. *See* Footnote 28 and accompanying text, *infra*.

26. *See* 43 Fed. Reg. 45,176 (1978); 44 Fed. Reg. 17,926 (1979). The preamble to the recodification of Title 45 of the Code of Federal Regulations states: "this redesignation is not intended to change policies affecting Medicaid or the other programs. Therefore, we do not intend for the States and HEW Regional Offices to interpret and apply them differently than they did before the redesignation." 44 Fed. Reg. 17,925 (1979).

> *needy*, as a member of an AFDC [Aid to Familes (sic) with Dependent Children] family, as a needy individual under the age of 21, *or under another of the optional groups included in the plan*) . . . (emphasis added).[27]

HEW's *Medical Assistance Manual on Continued Medicaid Coverage Provisions*, Part 4-30-20.

This obligation to provide an *ex parte* redetermination of a class member's eligibility is not affected by the Contract between New York State and the Secretary under which the Secretary agrees to re-evaluate a recipient's continued eligibility, because: (a) the Secretary's function is limited by the Contract to individuals who are eligible to receive SSI; and (b) the Contract binds the Secretary to furnish to the State information which is relevant to Medicaid eligibility concerning individuals who no longer qualify for SSI so as "to assist the State in carrying out its function under its Medicaid program." Contract at Article II, Clause D. This latter provision thus contemplates a duty by the State to re-evaluate terminated SSI recipients in order to determine continued entitlement to Medicaid based upon information provided to the State by HEW.

Federal regulations also require a participating [S]tate to reinstate Medicaid benefits to a terminated recipient if the recipient requests a hearing within ten days from the mailing of a notice of termination by the State. 44 Fed.

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27. *See also HEW Instruction to SRS Regional Commissioners on State Responsibilities for Notification to Recipients*, which in interpreting 45 C.F.R. §206.10(a)(5) (1976) (now recodified as 42 C.F.R. §435.930 (1978), advises that "the state must continue medicaid assistance to terminated or suspended SSI recipients until it [the state] determines them ineligible for title XIX [Medicaid];".

Reg. 17,933 (1979) (to be codified at 42 C.F.R. §431.231).[28] In such a case, benefits continue pending a decision reached after the hearing. *Id.* The regulations provide for Federal assistance to the [S]tate for "[p]ayments for services continued pending a hearing decision." 44 Fed. Reg. 17,934 (1979) (to be codified at 42 C.F.R. §431.250[a]). These regulations clearly contemplate that state Medicaid payments to a terminated recipient must be reinstated if, but only if, the recipient requests a hearing within ten days of the mailing of notice of termination by the State. If a recipient fails to request a hearing within that period, the terminated recipient can still gain a hearing by submitting a request within "a reasonable time, not to exceed 90 days from the date that notice of action is mailed." 44 Fed. Reg. 17,932 (1979) (to be codified at 42 C.F.R. §431.221[d]); in such a case, however, the [S]tate need not reinstate benefits pending decision at the hearing, *id.* at 17,933 (to be codified at 42 C.F.R. §431.231), nor would Federal reimbursement be available to the [S]tate if it were to do so. *Id.* at 17,934 (to be codified at 42 C.F.R. §431.250).

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28. 44 Fed. Reg. 17,932 (1979) (to be codified at 42 C.F.R. §431.231) provides in relevant part:

(a) The agency may reinstate services if a recipient requests a hearing not more than 10 days after the date of action.

(b) The reinstated services must continue until a hearing decision unless, at the hearing, it is determined that the sole issue is one of Federal or State law or policy.

(c) The agency must reinstate and continue services until a decision is rendered after a hearing if—

(1) Action is taken without the [requisite ten day] advance notice . . .;

(2) The recipient requests a hearing within ten days of the mailing of the notice of action; and

(3) The agency determines that the action resulted from other than the application of Federal or State law or policy.

New York State has implemented these regulations, which allow a class member ten days from mailing of notice by the State to demand a hearing in order to gain a continuation of benefits pending a hearing, in 18 N.Y.C.R.R. §358.8(c)-(d).

In the light of these considerations, once New York State is notified by the Federal government that a member of the class has been terminated from SSI, the State is required to make an independent, *ex parte* determination of the individual's continued Medicaid eligibility. If the State determines that the individual is no longer eligible, it is required to give adequate notice to the member of the class at least ten days prior to termination in accordance with the regulations set forth at 44 Fed. Reg. 17,932 (1979) (to be codified at 42 C.F.R. §§431.210-431.213). Medicaid payments must continue until ten days after mailing of notice. If a hearing is requested within that ten days, New York State [m]ust reinstate benefits to the individual pending a decision following the hearing pursuant to 44 Fed. Reg. 17,932 (1979) (to be codified at 42 C.F.R. §431.231). Although the regulations do not require New York State to reinstate Medicaid benefits to a terminated recipient who fails to ask for a hearing within ten days of the mailing of notice, the State must accord a hearing if his request meets the standards set by 44 Fed. Reg. 17,932 (1979) (to be codified at 42 C.F.R. §§431.220-431.221).

This court recognizes that New York State has delegated many of its responsibilities in this area to local social services departments, and that indeed at least one of these departments, New York City, is a party to this action.

This holding incorporates explicit Federal regulations governing state Medicaid programs and comports with recent decisions in this field of law. *See Brown* v. *Wohlgemuth*, 371 F. Supp. 1035, 1039 (W.D. Pa.), *aff'd*, 492 F.2d 1238 (3d Cir. 1974) (withholding by state of regularly scheduled welfare checks without notice violated Federal requirement that aid shall be continued regularly until an eligible individual is found to be ineligible, 45 C.F.R. 206.10(a)(5) (1978); state ordered to reinstate benefits); *Brown* v. *Weinberger*, 382 F. Supp. 1092, 1099 (D. Md. 1974), *aff'd mem.*,

529 F.2d 514 (4th Cir. 1975) (state enjoined from terminating benefits to qualified individuals until Federal regulations complied with); *Buckles* v. *Weinberger*, 398 F. Supp. 931, 946 (E.D. Pa. 1975); *Saurino* v. *Weinberger*, 396 F. Supp. 992 (D.R.I. 1972); *Sharpe* v. *Califano*, No. 79-1977 (S.D.N.Y. August 6, 1979) (New York State ordered to pay interim benefits to individuals whose initial application for SSI had been denied and whose request for a reconsideration hearing remained pending in excess of specified period). The result will further the policy of 42 U.S.C. §1396a(19) (1976) by assuring that the State will provide such safeguards as may be necessary to assure that ". . . [Medicaid] services will be provided in a manner consistent with . . . the best interests of the recipients." *See also, Cohen* v. *D'Elia*, 389 N.Y.S.2d 406, 408, 55 A.D.2d 617, 618 (2d Dep[t]. 1976).

The procedures for termination set forth above satisfy the requirements of the Due Process Clauses of the Fifth and Fourteenth Amendments. *Goldberg* v. *Kelly*, 397 U.S. 254 (1970); *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). Each class member whose Medicaid benefits is terminated will receive notice and an opportunity for a hearing. *Wolff* v. *McDonnell*, 418 U.S. 539, 557-58 (1974). Furthermore, a class member can gain reinstatement of benefits pending a hearing by making a request within ten days of termination.

In *Mathews* v. *Eldridge, supra* at 335, the Court specified that whether Due Process necessitates a pre-termination hearing turns upon a balancing of three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional . . . procedural safeguards; and finally, the

> Government's interest, including the function involved and the fiscal and administrative burdens that the additional . . . procedural requirement would entail.

In view of the *ex parte* State redetermination of eligibility prior to cut off, the availability of reinstatement upon request within ten days of mailing of notice, and the substantial extra fiscal and administrative burden that would fall upon New York State if a pre-termination hearing were required in every case, the procedures set forth above comport with the requirements of Due Process. *See Schneider* v. *Whaley, supra,* 541 F. 2d at 919-22 ([upheld] similar procedures for termination of day care services).

DAMAGES

Finally, Stenson seeks $15,000 in damages, reasonable attorney's fees, and the costs and disbursements incurred in connection wtih this litigation. Based on *Edelman* v. *Jordan,* 415 U.S. 651 (1974), Stenson's request for monetary damages is denied. The *Edelman* Court, dealing with a class action for injunctive and declaratory relief against state officials who administered the Federal-State program of Aid to the Aged, Blind and Disabled, held that "a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." *Id.* at 663. *See Quern* v. *Jordan,* —— U.S. ——, 99 S.Ct. 1139 (1979); *Fitzpatrick* v. *Bitzer,* 427 U.S. 445, 451 (1976); *Ford Motor Co.* v. *Department of Treasury,* 323 U.S. 459, 462-463, 464 (in which Court noted the exception that by an appropriate statute a state may expressly waive its immunity from suit). Although this action was filed against defendants individually and in their capacity as government officials, New York State is the real party in interest and can therefore invoke its sovereign immunity. *See Ford Motor Co., supra* at 464.

Therefore, Stenson is not entitled to recover monetary damages.[29]

Stenson is entitled to recover reasonable attorney's fees from New York State pursuant to 42 U.S.C. §1988, which provides in pertinent part: "In any action or proceeding to enforce a provision of sections . . . 1983, . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." Stenson's entitlement to attorney's fees is unaffected by the fact that this court bases its holding in part on the constitutional claim. *See Holley* v. *Lavine*, Nos. 79-7182, 79-7190, 79-7207, Slip Op. at 3725 (2d Cir. July 13, 1979); *Gagne* v. *Maher*, 455 F. Supp. 1344, 1348 (D. Conn. 1978); *Southeast Legal Defense Group* v. *Adams*,[30] 436 F. Supp. 891, 895 (D. Ore. 1977).

For the foregoing reasons, New York State is hereby enjoined to restore Medicaid benefits to Stenson and mem-

29. The sovereign immunity doctrine does not, however, preclude this court's holding, *supra*, that Medicaid payments may not be terminated by New York State until after an appropriate determination of an individual's continued Medicaid eligibility is made. As noted in *Quern* v. *Jordan*, —— U.S. ——, ——, 99 S.Ct. 1139, 1143 (1979) "a federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law, even though such an injunction may have an ancillary effect on the state treasury." *See also Kimble* v. *Solomon*, 599 F.2d 599 (4th Cir. 1979).

30. The *Adams* court held that 42 U.S.C. §1988 sanctions an award of attorney's fees where, as here, both fee and non-fee claims are raised and the plaintiff prevails on the non-fee claim. As used herein, a non-fee claim is a claim which does not fall within 42 U.S.C. §1988, but which is joined with constitutional claims for which attorney's fees may be recovered pursuant to section 1988. As the court in *Adams* noted, "it seems manifestly unfair to penalize plaintiffs who couple their constitutional claims with meritorious statutory claims and thereby facilitate the federal policy of avoiding unnecessary constitutional decisions. To deny such plaintiffs the attorneys' fees to which they might otherwise be entitled frustrates rather than promotes the policy of the Act." *Id.* at 895.

bers of her class until such time as New York State[31] determines whether the individual class members remain eligible for Medicaid on a ground other than categorical eligibility, until such individuals receive timely and adequate notice of the proposed termination of their Medicaid benefits, and until they are accorded the opportunity for a hearing. *See Kimble* v. *Solomon*, 599 F.2d 599 (4th Cir. 1979) (injunction requiring state to restore benefits prospectively pending proper notice and hearing does not violate Eleventh Amendment).

New York State shall pay to Stenson the reasonable attorney's fees incurred by her in the prosecution of this action.

For the foregoing reasons, Stenson's motion for summary judgment is granted in part and denied in part. The motions by the Federal defendant (for summary judgment) and by the City defendant (to dismiss) are granted and the motion by New York State is granted in part and denied in part, as indicated above.[32] Stenson shall, within ten days hereof, submit to the clerk of the court a proposed judgment, on ten days' notice, consistent with this opinion.

IT IS SO ORDERED

/s/ ROBERT W. SWEET

ROBERT W. SWEET
U.S.D.J.

Dated: New York, New York
September 18, 1979

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31. *See* page 14 *supra*.

32. *See* footnote 2 *supra*, and text accompanying footnote 2.

Stipulation and Order (Unsigned by Court) Granting TRO to Proposed Plaintiff Intervenors

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

78 Civ. 6044 (RWS)

ELLEN STENSON, et al.,

Plaintiff,

and

MICHAEL MURTAGH AND DOROTHY WILSON

Plaintiffs-Intervenors,

against

BARBARA BLUM, et al.,

Defendants.

IT IS HEREBY STIPULATED and AGREED by and between the attorneys for the respective parties that, notwithstanding the merits of the law suit and to insure that plaintiff/intervenors MICHAEL MURTAGH and DOROTHY WILSON do not suffer any harm or injury while the merits of this suit are being argued and determined:

1. [deleted by A.M.]

2. The New York City Department of Social Services and The New York State Department of Social Services agree to immediately provide plaintiff with interim Medi-

caid benefits until the hearing and determination of plaintiff's motion for a preliminary injunction.

3. Plaintiff/Intervenors' applications for an Order to Show Cause for intervention and other relief shall be considered as motions returnable at 2:00 P. M. on March 30, 1979.

4. Service of the Order to Show Cause for Intervenors and Temporary Restraining Order with Supporting Affidavit and Proposed Intervenor Complaint-Class Action for plaintiff/intervenors MICHAEL MURTAGH and DOROTHY WILSON is deemed admitted for the defendants in their official capacity.

5. Participation in this Stipulation by the defendant CALIFANO is without prejudice to any motion he may make as to his being a proper party to this lawsuit.

JOAN MANGONES, ESQ.
THE LEGAL AID SOCIETY
Attorneys for Plaintiff and
Plaintiff/Intervenor
MICHAEL MURTAGH

By /s/ ANN MOYNIHAN

ANN MOYNIHAN

MORTON B. DICKER, ESQ.
Attorney for Plaintiff/Intervenor
DOROTHY WILSON
THE LEGAL AID SOCIETY
11 Park Place
New York, N.Y. 10007 (BA 7-2755)

By /s/ PAULA GALOWITZ

PAULA GALOWITZ

Stipulation and Order (Unsigned by Court)

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendant Blum
in her official capacity as
Commissioner

By: /s/

MARION BUCHBINDER
Assistant Attorney General
(212) 488-3023

HENRY ADLER, ESQ.
Attorney for New York City
Department of Social Services
Attorney for Defendant Bernstein
as Commissioner of the New York
City Department of Social Services.

/s/

ROBERT B. FISK, JR.
United States Attorney for the
Southern District of New York
Attorney for Defendant Califano
in his official capacity as
Secretary of H.E.W.

By: /s/

THOMAS D. WARREN
Assistant U.S. Attorney
791-1959

SO ORDERED

U.S.D.J.

Plaintiff's Notice of Settlement Dated September 28, 1979

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

78 Civ. 6044 (RWS)

ELLEN STENSON, individually and on behalf of all other persons similarly situated,

Plaintiff,

against

BARBARA BLUM, individually, and in her capacity as Commissioner of the New York State Department of Social Services, BLANCHE BERSTEIN, individually [and] in her capacity as Commissioner of the New York City Department of Social Services, and JOSEPH CALIFANO, JR., individually and in his capacity as Secretary of Health, Education and Welfare of the United States,

Defendants.

PLEASE TAKE NOTICE that the within Order and Judgment will be presented for signature and settlement to the Honorable Robert W. Sweet, United States District Judge, at the Office of the Clerk of this Court, Room G-37, United States Courthouse, Foley Square, New York, New York, on the 12th day of October 1979 at 10:00 a.m. or as soon thereafter as counsel may be heard.

Dated: New York, New York
September 28, 1979

Plaintiff's Proposed Order and Final Judgment (Unsigned)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

This case having come before the Court on plaintiff Ellen Stenson's motions for class certification and summary judgment, the motions of Barbara Blum (the State defendant) and Joseph Califano, Jr. (the Federal defendant) for summary judgment, the motion of Blanche [Bernstein] (the City defendant) to dismiss, and the motions of Michael Murtagh and Dorothy Wilson to intervene as plaintiffs, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. Plaintiff's motion for class certification pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure is granted, the class to be composed of all New York State residents who have received or are receiving Medicaid benefits due to their eligibility for Supplemental Security Income (SSI) and whose Medicaid benefits are or have been reduced, terminated or suspended because of subsequent ineligibility for [SSI] without their having been accorded all of the following; (a) an *ex parte* determination of continued eligibility for Medicaid, independent of ineligibility for SSI.; (b) timely and adequate advance notice of such reduction, termination or suspension; and (c) an opportunity for an evidentiary hearing prior to the reduction, termination or suspension of benefits.

2. Plaintiff's motion for summary judgment is granted in part and denied in part; the Federal and City defend-

ants' motions are granted in whole; the state defendant's motion for summary judgment is denied in part and granted in part.

3. The motions of Michael Murtagh and Dorothy Wilson for intervention are denied.

4. The complaint is dismised against the Federal and City defendants.

5. Plaintiff Ellen Stenson's claim for money damages against the State defendant is denied.

6. As used in this Order and Judgment

(a) the term "Medicaid benefits" refers to benefits and services provided pursuant to Title XIX of the Social Security Act, 42 U.S.C. §§1396-1396i;

(b) the term "Supplemental Security Income (or S.S.I.) benefits" refers to benefits provided pursuant to Title XVI of the Social Security Act, 42 U.S.C. §§1381-1383c;

(c) the term "*ex parte* determination" refers to a determination at which the affected individual need not be present; and

(d) the phrase "terminating, reducing or suspending Medicaid benefits" includes any action or proposed action that will result in a termination, reduction or suspension of Medicaid benefits or a reduction or discontinuance of services received under the Medicaid program.

7. The State defendant's failure to determine the continued Medicaid eligibility of members of the plaintiff

class, independent of each individual's ineligibility for S.S.I. after notification by the Federal government that such class member's S.S.I. benefits have been reduced, terminated or suspended, violates Title XIX of the Social Security Act, 42 U.S.C. §§1396-1396i, and the regulations promulgated thereunder, specifically 42 C.F.R. §§435.916(c) and 435.930(b).

8. The State defendant's failure to send to each class member timely and adequate advance notice of intent to reduce, terminate or suspend Medicaid benefits at least ten days before the effective date of the proposed reduction, termination or suspension of such benefits violates Title XIX of the Social Security Act, 42 U.S.C. §§1396-1396i, and the regulations promulgated thereunder, specifically 42 C.F.R. §§431.210 and 431.211, as well as the applicable New York State regulations, specifically 18 N.Y.C.R.R. 358.8(a), (c).

9. The State defendant's failure to provide each class member with an opportunity for an evidentiary hearing at which the State or local agency must establish and the class member may contest the grounds for the proposed reduction, termination or suspension of his or her Medicaid benefits, and the State defendant's further failure to provide each class member with the opportunity to obtain continued Medicaid benefits until a decision is rendered after such hearing violate Title XIX of the Social Security Act, 42 U.S.C. §1396-1396i, and the regulations promulgated thereunder, specifically 42 C.F.R. §§431.220(a)(2) and 431.230, as well as the applicable New York State regulations, specifically 18 N.Y.C.R.R. §§358.4(a)(4), 358.8(c).

10. The State defendant's reduction, termination or suspension of each class member's Medicaid benefits, following notification from the Federal government that such

class member's S.S.I. benefits have been terminated or suspended, without according that class member,

(a) an *ex parte* determination of continued eligibility for Medicaid benefits, independent of ineligibility for S.S.I. benefits;

(b) timely and adequate advance notice of such reduction, termination or suspension; and

(c) an opportunity for an evidentiary hearing at which the State or local agency must establish and the class member may contest the grounds for the proposed action and a decision after such hearing

prior to the termination of Medicaid benefits violates Title XIX of the Social Security Act, 42 U.S.C. §§1396-1396i, the regulations promulgated thereunder, specifically 42 U.S.C. §§431.210, 431.211, 431.220(a)(2), 431.230, 435.916(c) and 435.930(b), and the applicable New York State regulations, specifically 18 N.Y.C.R.R. §§358.4(a)(4) and 358.8(a), (c).

11. Defendant Blum, as Commissioner of the New York State Department of Social Services, and her employees, agents and successors in office are hereby ordered, directed and enjoined, within thirty days of the entry [of] this judgment, to fully restore Medicaid benefits, effective from the date of entry of this judgment, to all members of the plaintiff class and to continue providing to each member of the plaintiff class such Medicaid benefits until such time as the State defendant:

(a) determines pursuant to the procedures set forth in paragraph 12 below, whether the class member remains eligible for Medicaid, independent of that individual's ineligibility for S.S.I.;

(b) provides timely and adequate advance notice of any proposed reduction, termination or suspension of Medicaid benefits; and

(c) affords those individuals notified of a proposed reduction, termination or suspension of Medicaid benefits with an opportunity for a hearing at which the State or local agency must establish and the individual may contest the grounds for the proposed reduction, termination or suspension and a decision after such hearing,

as required by Title XIX of the Social Security Act, 42 U.S.C. §§1396-1396i, and the regulations promulgated thereunder, specifically 42 C.F.R. §§431.210, 431.211, 431.220 (a)(2) and 431.230, and as further required by the applicable New York State regulations, 18 N.Y.C.R.R. §§358.4 (a)(4) and 358.8.

12. Defendant Blum, as Commissioner of the New York State [Department] of Social Services, and her employees, agents and successors in office are hereby enjoined from reducing, terminating or suspending the Medicaid benefits of any individual after the Federal government has notified the State that such individual's S.S.I. benefits have been terminated or suspended

(a) without first [determining] the continued Medicaid eligibility of that individual, independent of such individual's ineligibility for S.S.I., as required by Title XIX of the Social Security Act, 42 U.S.C. §§1396-1396i, and the regulations promulgated thereunder, specifically 42 C.F.R. §§435.916(c) and 435.930(b). This determination shall be based upon information provided to the State by the Secretary of Health, Education and Welfare of the United States as well as evidence pertinent to those factors which affect eligibility and the amount of entitlement that is obtained by the State defendant after appropriate and adequate consultation with and input from the affected individual;

(b) without providing that individual with timely and adequate notice of intent to reduce or terminate

Medicaid benefits at least ten days before the effective date of any proposed reduction, termination or suspension of benefits as required by the Social Security Act, 42 U.S.C. §1396-1396i, the regulations promulgated thereunder, 42 C.F.R. §§431.210, 431.211, and the applicable New York State regulations, 18 N.Y.C.R.R. §§358.4(a)(4) and 358.8. Such notice shall contain, *inter alia*, a statement of what action the State agency intends to take, the reasons for the intended action, the specific regulations that support the intended action, an explanation of the individual's right to request a hearing, and notice that, if the individual timely requests a fair hearing, Medicaid benefits will be continued until the fair hearing decision is rendered; and

(c) prior to the issuance of a decision after a timely requested fair hearing, as required by Title XIX of the Social Security Act, 42 U.S.C. §§1396-1396i, the regulations promulgated thereunder, specifically 42 C.F.R. §431.230, and the applicable New York State regulations, specifically 18 N.Y.C.R.R. §358.8(c).

13. Defendant Barbara Blum, as Commissioner of the New York Department of Social Services, and her employees, agents and successors in office are hereby directed, ordered and enjoined to notify each individual who is a class member on the date of entry of this Order and Judgment, within thirty days of entry of this Order and Judgment, of his or her rights pursuant to this Order and Judgment, specifically of the right to restoration of Medicaid benefits, if they have not already been restored, and of the availability of state administrative procedures should the class member desire to have the State determine whether he or she is entitled to past Medicaid benefits. The notices to be sent to each class member are annexed hereto as Exhibits A and B. The State defendant will include with the

appropriate notice a request for hearing form for use by class members wishing to pursue their state administrative remedies. The request for hearing form to be used is annexed hereto as Exhibit C. Exhibit A, B and C shall be provided to class members in both English and Spanish.

14. Plaintiff and plaintiff class members shall be entitled to the procedural safeguards and requirements found in the applicable Federal and State regulations, including the provision of an opportunity for a post-reduction, termination or suspension evidentiary hearing where a prereduction, termination or suspension hearing is not timely requested, as required by 42 C.F.R. §220(a)(2) and 18 N.Y.C.R.R. §358.4(a)(4).

15. The plaintiff shall recover the costs, expenses, and disbursements of this action, together with reasonable attorneys fees, pursuant to 42 U.S.C. §1988, in an amount to be determined by the Court upon application by the plaintiff.

16. The terms of this judgment shall bind the State defendant and her successors in office, their officers, agents, servants, employees and attorneys, and those persons in active concert or participation with them who receive actual notice of this judgment by personal service or otherwise.

17. This Court retains jurisdiction over this action for the purpose of issuing any orders which may be necessary for the construction, implementation or enforcement of this Order and Judgment or of any of the provisions thereof.

So Ordered:

_____

United States District Judge

Dated:

Exhibit A to Plaintiff's Proposed Order and Final Judgment

RESTORATION NOTICE

TO BE SENT TO CLASS MEMBERS NOT CURRENTLY RECEIVING MEDICAID BENEFITS.

Dear Sir or Madam:

YOU ARE BEING RESTORED TO MEDICAID.

Enclosed is a medicaid card. This card is being sent to you as a result of a court decision in the case of *Stenson* v. *Blum*, 78 Civ. 6044 (S.D.N.Y.). You are one of the class members in that case because your Medicaid benefits were automatically stopped by the New York State Department of Social Services when you were cut off S.S.I.

When you lost your S.S.I. benefits you should have continued to receive Medicaid until the Department reviewed your case to see whether you were still eligible for Medicaid even though your S.S.I. benefits had stopped. Since this was not done, we are restoring you to Medicaid until we have completed a review of your case.

When the review is completed, you will be advised if we intend to reduce or terminate your Medicaid benefits. At that time, you will be notified of your right to contest any decision to reduce or terminate your benefits.

Our review of your case will determine only if you are *now* eligible for Medicaid. Since you lost Medicaid benefits in the past following the termination of your S.S.I. benefits, you may wish to have a hearing on whether you were improperly denied these Medicaid benefits. To do this you must request a hearing now. A hearing request is attached for your convenience. You will want to request a hearing about your past Medicaid benefits if you incurred medical expenses *after you were cut off S.S.I. and were not covered by Medicaid.*

Your request for a hearing should be sent to: The New York State Department of Social Services, Fair Hearing Section, 40 North Pearl Street, Albany, New York.

Exhibit B to Plaintiff's Proposed Order and Final Judgment

To Be Sent to Class Members
Currently Receiving Medicaid Benefits.

Dear Sir or Madam:

Our records indicate that you are presently receiving Medicaid benefits. If you are not receiving benefits, please contact your local Department of Social Services to have your benefits restored under the Court's decision in *Stenson* v. *Blum*, 78 Civ. 6044 (S.D.N.Y.).

The New York Department of Social Services has been automatically stopping Medicaid benefits after a recipient has been cut off S.S.I. The Federal Court in *Stenson* found this practice illegal. For this reason, even if you are currently receiving Medicaid benefits, you may have improperly lost Medicaid coverage for a period of time after your S.S.I. benefits stopped. If you wish the State to determine whether you have been improperly deprived of Medicaid benefits in the *past*, you must request a hearing now. A hearing request is attached for your convenience. You may want to request a hearing about your past Medicaid benefits if you incurred medical expenses *after you were cut off S.S.I. and were not covered by Medicaid.*

Your request for a hearing should be sent to: The New York State Department of Social Services, Fair Hearing Section, 40 North Pearl Street, Albany, New York 12243.

Exhibit C to Plaintiff's Proposed Order and Final Judgment

REQUEST FOR A FAIR HEARING

Fair Hearing Section
New York State Department of Social Services
40 North Pearl Street
Albany, New York 12243

Sir or Madam:

I request a fair hearing. When I was cut off S.S.I. my Medicaid was stopped. I was never given advance notice or the opportunity for a hearing before my Medicaid was cut off and no determination was made on my eligibility for Medicaid after my S.S.I. benefits were stopped. I was without Medicaid benefits for a period of time and had medical expenses that I had to pay for or which still remain unpaid.

My name is _____

My address is _____

My Social Security Number is _____

Please send me a date for a hearing, and send me copies of all documents that will be used at the hearing.

Final Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

78 Civ. 6044 (RWS)

ELLEN STENSON, individually and on behalf of all other persons similarly situated,

Plaintiff,

vs.

BARBARA BLUM, individually and in her capacity as Commissioner of the New York State Department of Social Services, STANLEY BREZENOFF, individually and in his capacity as Commissioner of the New York City Department of Social Services, and JOSEPH CALIFANO, JR., individually and in his capacity as Secretary of Health, Education and Welfare of the United States,

Defendants.

This case having come before the Court on plaintiff Ellen Stenson's motion for class certification and summary judgment, the motions of Barbara Blum (the State defendant) and Joseph Califano, Jr. (the Federal defendant) for summary judgment, the motion of Stanley Brezenoff (the City defendant) to dismiss, and the motions of Michael Murtagh and Dorothy Wilson to intervene as plaintiffs; and an opinion having been rendered on September 18, 1979, granting plaintiff's motion for class certification, granting in part and denying in part plaintiff's motion for

summary judgment, granting in part and denying in part the State defendant's motion for summary judgment, granting the motions of the Federal defendant for summary judgment and of the City defendant to dismiss, and denying the motions of Michael Murtagh and Dorothy Wilson to intervene as plaintiffs, it is hereby

ORDERED, ADJUDGED AND DECREED that:

1. Plaintiff's motion for class certification pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure is granted, the class to be composed of all New York State residents who received Medicaid due to their eligibility for Supplemental Security Income ("SSI") and subsequently suffered a termination, reduction or suspension of Medicaid benefits because of subsequent ineligibility for SSI without their having received the following: (a) an *ex parte* determination of continued eligibility for Medicaid, independent of eligibility for SSI; (b) timely and adequate notice of such termination, reduction or suspension; (c) an opportunity for a hearing.

2. Plaintiff's motion for summary judgment is granted in part and denied in part; the Federal and City defendant's motions are granted in whole; the State defendant's motion for summary judgment is denied in part and granted in part.

3. The motions of Michael Murtagh and Dorothy Wilson for intervention are denied.

4. The complaint is dismissed against the Federal and City defendants.

5. Plaintiff Ellen Stenson's claim for money damages against the State defendant is denied.

6. As used in this Judgment

(a) the term "Medicaid benefits" refers to benefits and services provided pursuant to Title XIX of the Social Security Act, 42 U.S.C. §§1396-1396i;

(b) the term "Supplemental Security Income benefits" (or "SSI") refers to benefits provided pursuant to Title XVI of the Social Security Act, 42 U.S.C. §§1381-1383c;

(c) the term "*ex parte* determination" refers to a determination of continued eligibility for Medicaid benefits, at which the former SSI recipient need not be present, based on the information provided to the State by the Secretary of the Department of Health, Education and Welfare, on information which the State possesses concerning the eligibility of the former SSI recipient for any form of State public assistance, and on any additional information which the former SSI recipient provides in a timely manner at the request of the State defendant, prior to the terminating, reducing or suspending of Medicaid benefits.

(d) the phrase "termination, reduction or suspension of Medicaid benefits" includes any action or proposed action that will result in terminating, reducing or suspending Medicaid benefits or reducing or discontinuing services received under the Medicaid program.

(e) the phrase "timely and adequate notice" means the notice required by 42 C.F.R. §§431.210-431.214;

(f) the phrase "evidentiary hearing" means the hearing described by 42 C.F.R. §§431.201, 431.240, 431.241, 431.242, 431.243, 431.244, and 431.245;

(g) the phrase "timely requested evidentiary hearing" means an evidentiary hearing requested within

the time limits prescribed by 42 C.F.R. §§431.221, 431.230, 431.231 and 18 N.Y.C.R.R. §358.5(a).

7. The State defendant's failure to make an *ex parte* determination of an individual's continued Medicaid eligibility independent of eligibility for SSI, after notification by the Federal government that an individual is no longer eligible for SSI, violates Title XIX of the Social Security Act, 42 U.S.C. §§1396-1396i; and 42 C.F.R. §435.916(c), 435.930(b) and 435.1003.

8. The State defendant's failure to send to former SSI recipients timely and adequate notice of intent to effect termination, reduction or suspension of Medicaid benefits violates Title XIX of the Social Security Act, 42 U.S.C. §§1396-1396i, and 42 C.F.R. §§431.202, 431.210 and 431.211, as well as the applicable New York State regulations, specifically 18 N.Y.C.R.R. §358.8(a).

9. The State defendant's failure to provide former SSI recipients with an opportunity for an evidentiary hearing violates Title XIX of the Social Security Act, 42 U.S.C. §§1396-1396i and 42 C.F.R. §§431.220(a), 431.230, as well as applicable New York State regulations, specifically 18 N.Y.C.R.R. §§358.4(a)(4), 358.8(c).

10. The State defendant's termination, reduction or suspension of Medicaid benefits of a former SSI recipient following notification from the Federal government that such recipient's SSI benefits have been terminated or suspended, without according that individual,

(a) an *ex parte* determination of continued eligibility for Medicaid benefits, independent of eligibility for SSI benefits;

(b) timely and adequate notice of such reduction, termination, or suspension of Medicaid benefits; and

(c) an evidentiary hearing if such hearing is timely requested

violates Title XIX of the Social Security Act, 42 U.S.C. §§1396-1396i, the regulations promulgated thereunder, specifically 42 C.F.R. §§431.210, 431.211, 431.220(a)(2), 431.230, 435.916(c) and 435.930(b), and the applicable New York State regulations, specifically 18 N.Y.C.R.R. §§358.4(a)(4) and 358.8(a), (c).

11. Within 60 days from the entry of this Judgment, the State defendant shall send a notice to all members of the plaintiff class except the following individuals.

(a) individuals who were terminated from Medicaid due to death;

(b) individuals who are currently recipients of Medicaid benefits; and

(c) individuals who have, subsequent to the initial termination from Medicaid, reapplied for Medicaid benefits and received notice of the denial of Medicaid benefits and of their right to a fair hearing.

The notice shall inform class members that their Medicaid benefits will be restored, at their request, effective as of the entry date of this Judgment. The notice shall further inform the class members that no further relief is available from their Federal action, and that retroactive benefits, to the extent that such benefits are available, must be sought through State administrative procedures.

In those local districts of the State in which no centralized records are maintained of recipients of public assistance, the State shall mail the notice to the most recent recorded address of each member entitled to receive notice.

In those local districts of the State in which centralized records are maintained of recipients of public assistance, the State shall search such records to determine the most recent recorded address of each class member and shall mail notice to the most recent address available to the State defendant.

The State defendant shall also publish the substance of the notice in local newspapers at least twice during the week of February 3, 1980.

12. The State defendant shall restore Medicaid benefits, as of the date of this judgment, to all persons who request such restoration in response to the notice sent pursuant to paragraph 11 of this Judgment. The State defendant shall mail Medicaid cards to class members within 30 days after a request for restoration of benefits is received by the State defendant. The State defendant shall continue to provide Medicaid benefits to those individuals until such time as the State defendant:

(a) make[s] an *ex parte* determination of the continued Medicaid eligibility of that individual;

(b) provides timely and adequate notice of any proposed reduction, termination or suspension of Medicaid benefits;

(c) provides that individual with an evidentiary hearing, if such a hearing is timely requested; and

(d) renders a decision after a hearing requested within the period prescribed by 42 C.F.R. §431.230 and 18 N.Y.C.R.R. §358.8.

13. The State defendant may discontinue Medicaid benefits to any individual whose benefits have been restored and then terminated in accordance with paragraph 12 of this Judgment, if that individual fails to request an eviden-

tiary hearing within ten days of the mailing of notice of termination. However, the State defendant will provide an evidentiary hearing to such individual if a hearing is requested within 60 days from the date that the State defendant's timely and adequate notice is mailed, pursuant to 18 N.Y.C.R.R. §358.5 and 42 C.F.R. §431.221(d).

14. The State defendant is hereby enjoined from a termination, reduction or suspension of Medicaid benefits of any individual after the Federal government has notified the State that such individual's SSI benefits have been reduced, terminated or suspended without:

(a) conducting an *ex parte* determination of that individual's Medicaid eligibility, independent of such individual's eligibility for SSI;

(b) providing that individual with timely and adequate notice of intent to reduce, suspend or terminate Medicaid benefits;

(c) according to those individuals notified of a proposed termination, reduction or suspension of Medicaid benefits an opportunity for an evidentiary hearing, if such hearing is timely requested; and

(d) rendering a decision after a timely requested hearing,

as required by Title XIX of the Social Security Act, 42 U.S.C. §§1396-1396i, and the regulations promulgated thereunder, specifically 42 C.F.R. §§431.210, 431.211, 431.220 (a)(2) and 431.230, and as further required by applicable New York State regulations, 18 N.Y.C.R.R. §§358.4(a)(4) and 358.8.

15. The plaintiffs shall recover the costs, expenses, and disbursements of this action, together with reasonable at-

torney's fees, pursuant to 42 U.S.C. §1988, in an amount to be determined by the Court upon timely application by the plaintiff.

16. The terms of this judgment shall bind the State defendant and her successors in office, their officers, agents, servants, employees and attorneys, and those persons in active concert or participation with them who receive actual notice of this judgment by personal service or otherwise. The performance by the Federal defendant of its functions under Title XIX of the Social Security Act shall not in itself be construed as placing the Federal defendant in active concert or participation the State defendant. Nothing in this Order and Judgment shall be construed to entitle the State defendant to Federal Medicaid reimbursement beyond that available under the relevant statutory and regulatory provisions.

17. This Court retains jurisdiction over this action for the purpose of issuing any orders which may be necessary for the construction, implementation or enforcement of this Judgment or of any of the provisions thereof, including approval of the notice to be sent to class members, such notice to be submitted on notice on or before December 28, 1979.

IT IS SO ORDERED:

/s/ ROBERT W. SWEET

ROBERT W. SWEET
U.S.D.J.

Dated: New York, New York
December , 1979

Defendant Blum's Order to Show Cause for Relief from Judgment and a Stay

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

78 Civ. 6044 (RWS)

ELLEN STENSON, individually and on behalf of all other persons similarly situated,

Plaintiffs,

against

BARBARA BLUM, individually and in her capacity as Commissioner of the New York State Department of Social Services, *et al.*,

Defendants.

Upon reading and filing the annexed affidavits of MARION R. BUCHBINDER and ROBERT F. SKERRETT, and defendant Blum's Memorandum of law, it is hereby:

ORDERED, that plaintiff or her attorney show cause before this Court in Room 1505 of the United States Courthouse, Foley Square, New York, New York, on the 1st day of February, 1980, at 2 P.M. why an order should not be issued:

1. Pursuant to Fed. R. Civ. P. 60(b), in the interest of justice, relieving defendant Blum from her obligation under ¶¶ 11 and 12 of the Final Judgment to restore benefits to

class members, to identify and provide individual notice to class members, and to pay the costs of such identification and notice.

2. Pursuant to Fed. R. Civ. P. 62(b) granting a stay of execution of ¶¶ 11 and 12 of the Final Judgment pending determination of this motion.

3. Pursuant to Fed. R. Civ. P. 62(c) granting a stay of execution of ¶¶ 11 and 12 of the Final Judgment pending appeal.

Sufficient reason appearing therefor, it is FURTHER ORDERED that personal service of a copy of this Order and the papers on which it was granted on The Legal Aid Society, Civil Appeals and Law Reform Unit, 11 Park Place, New York, New York; on the United States Attorney for the Southern District of New York, One St. Andrews Plaza, New York, New York; and on the Human Resources Administration of the City of New York, Office of Counsel, 220 Church Street, New York, New York, on or before 5 P.M. on the 24th day of January, 1980, shall constitute sufficient service of this Order.

Dated: New York, New York
January 22, 1980

/s/ R. SWEET

U.S.D.J.

Issued 10:55 AM
January 23 1980

Reply Affidavit of Ann Moynihan in Opposition to Motion for Relief from Judgment and Stay

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

ANN MOYNIHAN, being duly sworn, deposes and says:

1. I am of counsel to JOAN MANGONES, ESQ., The Legal Aid Society, one of the attorneys for plaintiffs.

2. I make this affirmation in opposition to State defendant BLUM's order to show cause seeking relief from the provisions of paragraph[s] 1 and 12 of the Final Judgment, a stay of those provision pending determination of this motion and a stay pending appeal.

3. The State defendant in her moving papers has made no showing in support of her motion for relief from the provisions of paragraph 11 of the Final Judgment, requiring notice to some class members of their right, upon request, to have Medicaid benefits restored, or from the provisions of paragraph 12 of the Final Judgment, requiring restoration of benefits within 30 days of a request for restoration. Furthermore, the State defendant has had ample opportunity to advise this Court of the impact of paragraphs 11 and 12 of the Final Judgment, and has in fact, taken the opportunity to fully air her views in conference and in a sustained series of letters. The motion and affidavit before the Court, for the most part, merely rehash arguments already made by the parties and considered by the Court.

4. This Court rendered a decision on September 18, 1979, over four months ago, clearly stating that Medicaid

benefits should be restored to class members (See Decision, p. 16). The State defendant submitted a proposed order to this Court containing provision for such relief on October 11, 1979, along with a letter specifically addressing the factual and legal ramifications of the provisions eventually contained in paragraphs 11 and 12 of the Final Order (See attached exhibit 1, letter of Marion Buchbinder pp. 2 and 3, and proposed final judgment paragraphs 11 and 13). Plaintiffs responded to Ms. Buchbinder's letter and the State defendant's proposed judgment by letter dated October 15, 1979, and specifically addressed the issues raised as to the contents of what became paragraphs 11 and 12 of the Final Judgment (See attached exhibit 2, p. 4). The State defendant again addressed the issue of restoration of benefits in a letter to the Court, dated October 19, 1979, pointing out the burdens involved in restoring benefits to all class members. In light of these arguments the Court adopted the State defendant's proposal that certain class members should not be restored and adopted the State dependent's [sic] suggestion that only class members who request restoration should be restored (See attached exhibit 3, letter of Marion Buchbinder, p. 2). In quick succession, two further letters on the legal issues raised by the notices and restoration required by the Court were exchanged between plaintiffs and the State defendant (See attached exhibit 4, letter of plaintiffs' counsel dated October 24, 1979 and attached exhibit 5, letter of Marion Buchbinder dated October 30, 1979.[)]

5. The Court called a conference for November 16, 1978, for the specific purpose of discussing what administrative burden, if any, would be encountered by the State defendant in implementing the Court's direction that class members be restored to Medicaid and how to reduce that burden. At this conference the State defendant was directed to immediately begin identifying individuals entitled to restoration

and to report to the Court within 2 weeks concerning the available methods for determining the most recent addresses of those individuals, and the cost associated therewith. On November 30, 1979, the State defendant advised the Court of the results of a mailing to former class members and proposed that the Court adopt language in its order providing for notices to be mailed by January 18, 1979 advising class members how restoration of benefits could be achieved, and providing for notice of the Court's decision by publication in local newspapers. (See attached exhibit 6, letter of Marion Buchbinder). Plaintiffs response to that letter was contained in a letter to the Court on December 4, 1979 (See attached exhibit 7). The exchange of letters discussing the provisions of paragraphs 11 and 12 of the Final Judgment continued with a letter to the Court from the State defendant on December 12, 1979 (See attached exhibit 8), from the City defendant on December 17, 1979 (See attached exhibit 9); and from the plaintiffs' attorneys on December 18, 1979 (See attached exhibit 10). The Court's final order was signed on December 20, 1979. It required the submission of proposed notices. The State defendant submitted the proposed notice on December 31, 1979 (see attached exhibit 11). Plaintiffs' attorneys submitted their proposed notice on December 31, 1979 (see attached 12). By order dated January 4, 1980 the court specified the notice to be sent to class members.

6. Now, four months after the decision herein and a month after the entry of judgment, the State defendant moves this Court for relief from the provisions of paragraphs 11 and 12 of the Final Judgment.

7. The State defendant, in the course of one year of litigation has had adequate opportunity to address the legal issues raised by this case. The State defendant has been aware since September of 1979 that this Court proposed to restore Medicaid benefits to class members, and has been

given and has taken, every opportunity to inform this Court of the lagal [sic] and factual issues involved in the provision of paragraphs 11 and 12 of the Final Order.

8. The affidavit of Robert F. Skerrett submitted in support of the State defendant's motion contains no facts that would justify relief from the provisions of paragraphs 11 and 12. The conclusory allegations contained therein as to the effect of the order on the State defendants operations are vague and totally unsubstantiated, and no showing has been made to justify such relief.

9. Nor should the Court grant the State defendant's request for a stay of the implementation of paragraphs 11 and 12. The State defendant has made no showing of any irreparable harm that would flow from such implementation. The affidavit of Robert Skerret, submitted in support of the State defendant's motion, contains nothing more than conclusory allegations regarding the possible effects of implementation of the judgment. There are no facts providing the foundation for such a conclusion. Indeed, personal knowledge is not even alleged. It is hard to imagine how the requirement that notices be mailed out to class members and that Medicaid benefits be restored to those requesting restoration could irreparably harm an agency that has daily responsibility for providing notices to Medicaid applicants and recipients and for providing Medicaid benefits to those individuals.

10. The State defendant argues that on the one hand, restoration should not be required because the number of class [members] requesting restoration will be very small, while on the other hand she argues that the work involved in restoring benefits will be so extensive as to cause irreparable harm (See paragraph 9 of Robert Skerrett affidavit and Henry Adler's letter of December 17, 1979; both attached to the State defendant's order to show cause).

Using the "survey" discussed in Mr. Adler's letter and Mr. Skerrett's figure of 200,000 Medicaid terminations, however, 21,800 aged, blind and disabled individuals in New York State who were illegally terminated from Medicaid have not been restored to Medicaid since their termination from the S.S.I. program and are not now receiving Medicaid benefits.

11. As outlined above, the Court gave the State defendant ample opportunity to inform the Court of the possible burdens involved in notifying class members of their right to be restored to the Medicaid program. In response to the defendant's urging many of the State defendant's suggestions were incorporated into the final judgment, minimizing its impact on the State defendant's operations (e.g., limiting the class members entitled to restorations; requiring that class members request restoration). No new information has been presented to the Court on this motion that would justify a stay of the Court's order.

12. A stay of paragraphs 11 and 12 of the Final Judgment would affect thousands of indigent aged, blind and disabled individuals and would deprive them of Medicaid benefits that were illegally terminated and to which this Court has determined they are entitled. As in the case of Ellen Stenson and the proposed intervenors Michael Murtagh and Dorothy Wilson, the lack of Medicaid coverage can cause irreparable harm to aged, blind and disabled individuals in New York State.

WHEREFORE, the Court should deny the State defendant's motion for relief from paragraph 11 and 12 of the Final Judgment and should deny her application for a stay.

Dated: New York, New York
February 1, 1980

ANN MOYNIHAN

Letter of October 11, 1979

[LETTERHEAD OF]

STATE OF NEW YORK
DEPARTMENT OF LAW
Two World Trade Center
New York, N.Y. 10047
Telephone: 488-3023

ROBERT ABRAMS
Attorney General

October 11, 1979

Re: Stenson v. Blum
78 Civ. 6044

Hon. Robert W. Sweet
United States Courthouse
Foley Square
New York, New York 10007

Dear Judge Sweet:

Enclosed please find the State defendant's proposed Judgment in the above entitled action. The major differences between the State defendant's proposed Judgment and plaintiff's proposed Judgment are:

1. *Class definition* (paragraph 1 of both proposed Judgments): the class defined in the State defendant's proposed Judgment is identical to the class defined on page 4 of the Court's opinion; the class defined in plaintiff's proposed Judgment is different than the class defined in the Court's opinion.

2. *Definition of terms* (paragraph 6 of both proposed Judgments): the definition of "*ex parte* determination" in the State defendant's proposed Judgment has substantive meaning, plaintiff's definition of

"*ex parte*" determination does not. The State defendant's proposed Judgment also adds the definitions of "timely and adequate notice", "evidentiary hearing" and "timely requested evidentiary hearing" and defines those terms by reference to the relevant federal regulations.

3. *Declaratory relief concerning restoration of benefits* (paragraph 10 of both proposed Judgments): the regulations referred to in paragraph 10 of the State defendant's proposed Judgment are those on which the court relied to determine when payment of benefits may be stopped (pp 11-13 of the Court's opinion).

4. *Injunctive relief* (paragraphs 11-13 of the State's proposed Judgment, paragraphs 11-14 of plaintiff's proposed Judgment): Under plaintiff's proposed Judgment, the State defendant would be obliged to mail a Medicaid card to all persons whose SSI was terminated during the last five and one half years and who are not currently receiving Medicaid. This would include individuals who are now deceased or who have moved and left no forwarding address, as the State defendant has no way of knowing who those individuals are. Under the State defendant's proposed Judgment, the State would be assured that Medicaid cards are mailed only to the current address of living individuals. Unlike plaintiff's proposed Judgment, the State defendant's proposed Judgment makes no provision regarding notification of available State procedures for retroactive benefits, because 1) no such procedures exist, and 2) the Court's opinion requires only that benefits be prospectively restored. Moreover, it would be virtually impossible to determine whether a class

member was eligible for Medicaid in the past, as that individual would now, for the first time, be required to document his/her past income and resources, as well as his/her past medical expenses month by month. (Medically needy benefits are available only to meet documented medical expenses, and only when the documented medical expenses for any month exceeds a recipient's spend down requirement.)

Furthermore, plaintiff's apparent contention that the State fair-hearing procedure is available to review past Medicaid eligibility (see the notices annexed as exhibits "A" "B" and "C" to plaintiff's proposed Judgment) is unfounded. The fair-hearing procedure is only available to contest action (i.e. termination of benefits) taken within 60 days prior to the date on which the hearing is requested. 18 N.Y.C.R.R. Sec. 358.5.

The State defendant respectfully submits that a conference may be advisable to discuss the differences between the proposed Judgments.

Very truly yours,

ROBERT ABRAMS
Attorney General

By /s/ MARION R. BUCHBINDER
MARION R. BUCHBINDER
Assistant Attorney General

MRB:hg

cc: Arthur Fried, Esq.
Henry Adler, Esq.
Thomas Warren, Asst. U.S. Attorney

State Defendant's Proposed Final Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

This case having come before the Court on plaintiff Ellen Stenson's motions for class certification and summary judgment, the motions of Barbara Blum (the State defendant) and Joseph Califano, Jr. (the Federal defendant) for summary judgment, the motion of Blanche Bernstein (the City defendant) to dismiss, and the motions of Michael Murtagh and Dorothy Wilson to intervene as plaintiffs; and an opinion having been rendered on September 18, 1979, granting plaintiff's motion for class certification, granting in part and denying in part plaintiff's motion for summary judgment, granting in part and denying in part the State defendant's motion for summary judgment, granting the motions of the Federal defendant for summary judgment and of the City defendant to dismiss, and denying the motions of Michael Murtagh and Dorothy Wilson to intervene as plaintiffs, it is hereby

ORDERED, ADJUDGED AND DECREED that:

1. Plaintiff's motion for class certification pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure is granted, the class to be composed of all New York State residents who received Medicaid due to their eligibility for Supplemental Security Income (SSI) and whose Medicaid benefits have been terminated because of subsequent ineligibility for [SSI] without their having received one or more of the following: (a) an *ex parte* deter-

mination of continued eligibility for Medicaid, independent of eligibility for SSI.; (b) timely and adequate notice of such termination, (c) an opportunity for a hearing.

2. Plaintiff's motion for summary judgment is granted in part and denied in part; the Federal and City defendants' motions are granted in whole; the [S]tate defendant's motion for summary judgment is denied in part and granted in part.

3. The motions of Michael Murtagh and Dorothy Wilson for intervention are denied.

4. The complaint is dismissed against the Federal and City defendants.

5. Plaintiff Ellen Stenson's claim for money damages against the State defendant is denied.

6. As used in this Judgment

(a) the term "Medicaid benefits" refers to benefits and services provided pursuant to Title XIX of the Social Security Act, 42 U.S.C. §§ 1396-1396i;

(b) the term "Supplemental Security Income (or [SSI]) benefits" refers to benefits provided pursuant to Title XVI of the Social Security Act, 42 U.S.C. §§ 1381-1383c;

(c) the term "*ex parte* determination" refers to a determination based on the information provided to the State by the Secretary of the Department of Health Education and Welfare, and on any additional information which the former SSI recipient provides in a timely manner at the request of the State defendant.

(c) the phrase "terminating, reducing or suspending Medicaid benefits" includes any action or proposed action that will result in a termination, reduction or suspension of Medicaid benefits or a reduction or discontinuance of services received under the Medicaid program;

(e) the phrase "timely and adequate notice" means the notice required by 42 C.F.R. §§ 431.210-431.214;

(f) the phrase "evidentiary hearing" means the hearing described by 42 [C.F.R.] §§ 431.201, 431,240, 431.241, and 431.242;

(g) the phrase "timely requested evidentiary hearing" means an evidentiary hearing requested within the time limits prescribed by 42 [C.F.R.] § 431.230.

7. The State defendant's failure to make an *ex parte* determination of continued Medicaid eligibility independent of eligibility for [SSI] after notification by the Federal government that an individual is no longer eligible for [SSI] violates Title XIX of the Social Security Act (42 U.S.C. §§ 1396-1396i), and 42 C.F.R. § 435.1003(b).

8. The State defendant's failure to send to former [SSI] recipients timely and adequate notice of intent to terminate Medicaid benefits violates Title XIX of the Social Security Act, and 42 C.F.R. §§ 431.202, 431.210 and 431.211.

9. The State defendant's failure to provide former [SSI] recipients with an opportunity for an evidentiary hearing violates Title XIX of the Social Security Act, and 42 C.F.R. § 431.220(a)(2).

10. The State defendant's automatic termination of each class member's Medicaid benefits following notifica-

tion from the Federal defendant that such class member is no longer eligible for SSI violates Title XIX of the Social Security Act, and 42 C.F.R. §§ 431.210-431.213, 431.231, 435.916(c) and 435.930(b).

11. The State defendant shall restore Medicaid benefits, as of the date of this judgment, to all persons who request such restoration in response to the notice sent pursuant to paragraph 13 of this Judgment. The State defendant shall continue to provide Medicaid benefits to those individuals until such time as the State defendant:

a) makes an *ex parte* determination of the continued Medicaid eligibility of that individual;

b) provides timely and adequate notice of any proposed reduction, termination, or suspension of Medicaid benefits;

c) provides that individual with an evidentiary hearing, if such hearing is timely requested; and

d) renders a decision after a timely requested evidentiary hearing.

12. The State defendant may discontinue Medicaid benefits to any individual whose benefits have been restored pursuant to paragraph 11 of this Judgment when that individual fails to timely request an evidentiary hearing. However, the State defendant will provide an evidentiary hearing to such individual if a hearing is requested within 60 days from the date that the State defendant's timely and adequate notice is mailed, pursuant to 18 N.Y.C.R.R. § 358.5 and 42 C.F.R. § 431.221(d).

13. Within 90 days of the entry of this Judgment, the State defendant shall send a notice to all members of the

plaintiff class who are not currently on the State's Medicaid rolls informing them of the terms of this Judgment, and advising them that their Medicaid benefits will be restored, at their request, effective as of the entry date of this judgment.

14. The plaintiffs shall recover the costs, expenses, and disbursements of this action, together with reasonable attorneys fees, pursuant to 42 U.S.C. § 1988, in an amount to be determined by the Court upon timely application by the plaintiff.

15. The terms of this [J]udgment shall bind the State defendant, her successors in office, their officers, agents, servants and employees, and those persons in active concert with them in the provision of Medicaid benefits who receive notice of this [J]udgment by personal service or otherwise.

16. This Court retains jurisdiction over this action for the purpose of issuing any orders which may be necessary for the construction, implementation or enforcement of this Judgment or of any of the provisions thereof.

So Ordered:

Dated: New York, New York

_____

U.S.D.J.

Letter of October 15, 1979

[LETTERHEAD OF]

THE LEGAL AID SOCIETY
Civil Division
Civil Appeals & Law Reform Unit
11 Park Place—8th Floor
New York, N.Y. 10007
(212) 227-2755

JOHN E. KIRKLIN, Director of Litigation

October 15, 1979

The Honorable Robert W. Sweet
United States District Court
Room 410
United States Courthouse
Foley Square
New York, New York 10007

Re: Stenson v. Blum
78 Civ. 6044

Judge Sweet:

Plaintiffs submit this letter to highlight in greater detail than the State defendant has done the differences between her proposed Judgment and the Order and Judgment submitted by plaintiffs. As will be shown below plaintiffs' Order and Judgment implements the decision of this Court and gives comprehensive relief to the class while the State defendant's proposed [J]udgment gives short shift to, and, in many instances ignores, issues raised by the plaintiffs and ruled upon by the Court.

Letter of October 15, 1979

¶1. While the State defendant does define the class in the language used by the Court on page 4 of its Opinion, plaintiffs' language results in no substantive change and accurately reflects the fact that the Court's ruling covers current as well as past [SSI]/Medicaid recipients and applies not only to the termination of Medicaid benefits, but to their reduction or suspension as well. Plaintiffs' use of these terms tracks the language of the applicable regulations. 42 C.F.R. §413.201. The State defendant recognizes this by including reductions and suspensions within the ambit of ¶11(b) of her proposed Judgment.

¶6(c) of each order contains a definition of "*ex parte* determination." While the State defendant claims that plaintiffs' definition lacks substantive meaning, she totally ignores ¶12(a) of plaintiffs' Judgment and Order. It is ¶12(a) that gives substantive meaning to the requirement that the State defendant provide *ex parte* determinations of continuing Medicaid eligibility. Plaintiffs have no objection to the Court's defining *ex parte* determination as the State defendant does, as long as this definition does not replace the requirements of ¶12(a) of plaintiffs' Order and Judgment.

In ¶6(e) the State defendant purports to define "timely and adequate notice." In doing so, however, these terms are stripped of all meaning as they are defined by merely referring to all of the regulations concerning notice. The words "timely" and "adequate" are terms of art in the [F]ederal regulatory scheme. "Timely" notice is notice that is mailed at least 10 days before the date upon which the proposed action becomes effective. *See* 45 C.F.R. §205.10(a)(4)(A). The new Medicaid regulations call this "advance" notice. 42 C.F.R. §431.211. Adequate notice refers to the content of the notice[.] 45 C.F.R. §205.10(a)(4)(B). The applicable Medicaid regulation is now 42 C.F.R. §431.210. Plaintiffs believe that no definition of timely or adequate notice is needed in the definition section of the Order

and Judgment because the decretal paragraphs refer to the appropriate regulations. However, should the Court deem some definition of these terms necessary, the following definition avoids the confusion inherent in the State defendant's proposal:

> 6(e) the phrase "adequate notice" means a notice satisfying the requirements of 42 C.F.R. §431.210; the phrase "timely" or "advance" notice means notice satisfying the requirements of 42 C.F.R. §431.211.

¶7 Plaintiffs agree with the State defendant that 42 C.F.R. §435.1003(b) was violated and have no objection to its citation here, but point out that 42 C.F.R. §§435.916(c) and 435.930(b) were also violated, as recognized by the Court in its Opinion. *See* pp. 11, 12 n.27. These regulations should not be omitted from the Judgment, as defendant Blum has done.

In ¶8 of her proposed Judgment the State defendant omits mention of 18 N.Y.C.R.R. §358.8(a), (c) which the Court found was violated, *see* Opinion at p. 8 n.15, and adds 42 C.F.R. §431.202, a regulation that is wholly inapplicable to this paragraph.

While ¶[s]9 and 10 of the State defendant's proposed Judgment refer to one of the effects of the failure to provide members of the plaintiff class with hearings on their Medicaid eligibility, it does not reflect the extent to which this Court determined that the lack of hearings violated plaintiffs' statutory and regulatory rights. Not only did the failure to provide hearings violate the Social Security Act and the regulations promulgated thereunder, but the failure to provide an opportunity for continued Medicaid benefits pending that hearing and decision did also. The State defendant's suggestions skim over and sometimes ignore these important issues. They also use words, such as "automatic," that have no meaning in the context of the Medicaid regulatory scheme. Additionally, defendant

Blum fails to mention certain regulations that are applicable, such as 18 N.Y.C.R.R. §§358.4(a)(4), 358.8(c) and 42 C.F.R. §431.230, *see* Opinion at p. 8 notes 15 & 16, p. 13 n.28, and cites regulations that are not applicable to the plaintiff class, 42 C.F.R. §§431.213, 431.231.

¶11 of both Judgments is the paragraph implementing the Court's ruling that Medicaid benefits be prospectively restored in those instances where they had been illegally terminated. *See* Opinion at p. 16. However, in spite of the Court's unequivoval direction that the State defendant restore Medicaid benefits to all members of the plaintiff class "until such time as New York State determines whether the individual class members remain eligible for Medicaid on a ground other than categorical eligibility, until such individuals receive timely and adequate notice of the proposed termination of their Medicaid benefits, and until they are accorded the opportunity for a hearing," the State defendant attempts to shift the burden of rectifying her past statutory and regulatory violations to the victims of the illegal acts by restoring Medicaid benefits only to those who respond to a notice, a notice that defendant Blum has not submitted to plaintiff or to the Court, by requesting restoration of benefits.

Plaintiffs have no objection to the substance of defendant's proposed ¶ s 11(a), (b), (c) and (d), except to say that ¶ s 11(a), (b) and (c) of plaintiffs' Judgment and Order state these requirements much more clearly and specifically refer to the regulations applicable to the procedures the State defendant will be required to follow. The State's proposed judgment does not.

Amazingly, the State defendant totally omits the relief contained in ¶12 of plaintiffs' Order and Judgment. This paragraph contains the provisions that enjoin the State defendant from continuing to engage in the illegal practices that are the subject matter of this lawsuit. Surely plain-

tiffs are entitled to an injunction prohibiting the practices that the Court has declared to be illegal.

In ¶13 of plaintiffs' Order and Judgment the State defendant is required to notify all class members of the availability of state administrative procedures to determine whether he or she is entitled to past Medicaid benefits. Defendant Blum's response, that this procedure is not available to class members because it must be invoked within sixty days of the contested action, is ingenuous. First, this statement reduces to the argument that in spite of defendant's past illegal practices, this Court cannot fashion appropriate relief. It is self-evident that a Court has the equitable power to remedy the defendant's past practices by sending such a notice. *See Quern* v. *Jordan,* U.S. , 59 L.Ed2d 358 (1979). Second, state procedures to contest administrative action are, in fact, available more than 60 days after the action, where the affected individual has received no notice of the proposed action, as required by State and Federal law. *See, e.g., Winters* v. *Commissioner of New York State Department of Social Services,* 49 App. Div. 2d 843 (1st Dept. 1975); *Harris* v. *Wyman,* 42 App. Div. 2d 27, 29 (4th Dept. 1973); *Kantanas* v. *Wyman,* 38 App. Div. 2d 849 (2nd Dept. 1972). Moreover, to contend that difficulty of proof, caused only by defendant's own illegal actions, should now prevent plaintiffs from even pursuing their entitlement to benefits erroneously denied them, is patently unjust.

Defendant Blum's proposed Judgment omits plaintiffs' ¶14, which makes it clear that the plaintiff class is entitled to the administrative procedures found in the applicable State and Federal regulations.

¶15, as well as ¶s 10, 11, 12 and 13 of the State defendant's proposed Judgment, fail to track the language of Rule 65 of the Federal Rules of Civil Procedure in enjoining the defendant['s] behavior. The language used in plaintiffs' Judgment and Order does[.]

Letter of October 15, 1979

Throughout her proposed Judgment defendant Blum has inserted terms such as "individuals" and "former S.S.I. recipients" in places where the plaintiffs' Judgment and Order refers to members of the plaintiff class. Referring specifically to class members is certainly appropriate and will avoid the problems caused by the use of less precise terminology. For example, ¶9 cites the defendant's failure to provide evidentiary hearings to "all former S.S.I. recipients" when it should refer to class members only. *See also* ¶s 7 and 8 of the State defendant's proposed Judgment.

Finally, in speaking about the notices involved in this action, defendant Blum frequently refers to "timely and adequate notice." ¶s 8, 11(b) and 12 of the State defendant's proposed Judgment. As stated above the concept of timely notice in the former regulations is now called advance notice. Plaintiffs' use of "timely and adequate advance notice" makes it clear that, where appropriate, the Judgment will incorporate the time honored concept of timely notice while making reference to the language of the new regulations.

The State defendant's proposed Judgment eliminates numerous provisions of this Court's Opinion herein and contains imprecise and often confusing treatment of others, while plaintiffs' Judgment and Order presents a clear and comprehensive method of implementing this Court's opinion. Judgment should be entered as detailed in the Order and Judgment submitted by plaintiffs.

Very truly yours,

Arthur J. Fried
Ann Moynihan
Paula Galowitz

AJF:jp
cc: Marion Buchbinder
Thomas Warren
Henry Adler

Letter of October 19, 1979

[LETTERHEAD OF]

STATE OF NEW YORK
DEPARTMENT OF LAW
Two World Trade Center
New York, N.Y. 10047
Telephone: 488-3023

ROBERT ABRAMS
Attorney General

October 19, 1979

Re: Stenson v. Blum
78 Civ. 6044

Hon. Robert W. Sweet
United States Courthouse
Foley Square
New York, New York 10007

Dear Judge Sweet:

The State defendant submits this letter in response to plaintiff's letter of October 15, 1979.

The major substantive difference between the two proposed judgments is that plaintiff's proposed judgment contains a provision for retroactive relief while the State's does not. Plaintiff attempts to justify the inclusion of this provision by alleging that procedures exist to award such benefits, and she contends that other State court cases support her position. (P. 4 of plaintiff's letter). However, each of those cases only involved a correction of ministerial or mathematical errors in computing or paying assistance. When, as here, a denial of assistance did not result from a ministerial error, but from the exercise of a policy which was later declared invalid by the courts, the State courts

have held that State corrective procedures are not available for retroactive relief. *Toomey* v. *Blum* (Sup. Ct. Monroe Co. 1979) (unreported decision enclosed herewith); *Everson* v. *Toia*, 89 Misc. 2d 999 (Sup. Ct. Onondaga Co. 1976); *Fingland* v. *Lavine*, 88 Misc. 2d 1085 (Sup. Ct. Monroe Co.) *aff'd.* 54 A.D. 2d 1096 (4th Dept. 1976).

Moreover, in each of the cases cited by plaintiff, the Department's error was based on information which had been previously submitted by the recipient. In the case at bar, the recipients have never submitted any information to the State defendant, and would now, for the first time, be required to submit verified information covering a period of up to five and one half years.

Plaintiff's objection to the State's class definition (page 1 of the letter of October 15) is unfounded. As your honor recognized in the class definition in the opinion, there was never any claim in this action that the State defendant had reduced or suspended medicaid benefits. The only claim was that medicaid benefits had been terminated. Therefore, there is no representative of a class of persons whose benefits were reduced or suspended.

Plaintiff's complaint regarding implementation of the restoration of benefits is incredible. (Page 3 of letter of October 15)[.] Requiring class members to request such restoration is hardly a burden. On the other hand, the class can hardly receive any benefits from the requirement that the [S]tate send medicaid cards to persons who are deceased or who have moved and left no address. Moreover, such an action would only increase the possibility of having those cards fall into the wrong hands.

I have been advised by the Assistant United States Attorney that he has submitted a letter regarding the effect of the judgment on HEW. However, I have not yet re-

ceived a copy of that letter, and so I do not know whether a response to that letter will be necessary.

Very truly yours,

ROBERT ABRAMS
Attorney General
By /s/ MARION BUCHBINDER
MARION BUCHBINDER
Assistant Attorney General

MB:el

cc: Arthur J. Fried
Thomas Warren
Henry Adler, Esq.

Letter of October 24, 1979

[LETTERHEAD OF]

THE LEGAL AID SOCIETY
Civil Division
Civil Appeals & Law Reform Unit
11Park Place—8th Floor
New York, N.Y. 10007
(212) 227-2755

JOHN E. KIRKLIN, Director of Litigation
October 24, 1979

The Honorable Robert W. Sweet
United States District Judge
Room 410
United States Courthouse
Foley Square
New York, New York 10007

Re: Stenson v. Blum
78 Civ. 6044

Dear Judge Sweet:

Defendant [Blum's] letter of October 19, 1979 warrants a brief response. The cases cited therein for the proposition that state corrective procedures are not available for retroactive relief are totally inapposite. None of those cases involved a situation in which the failure to request a fair hearing within the sixty day limitation was caused by the defendant's own failure to provide notice of the intended action, as is the case here. In each of those cases, the recipients involved received timely and adequate notice of the challenged action and nonetheless failed to request review in a timely fashion. The policies that were later declared invalid were the substantiative policies that resulted in incorrect decisions and did not involve, as this

case does, the failure to provide the requisite notice and opportunity for a hearing. What defendant Blum's argument now reduces to is the contention that the State courts are powerless to correct a due process deprivation. This argument has been soundly rejected by the cases cited in plaintiffs' letter of October 15, 1979.

Very truly yours,

Arthur J. Fried
Ann Moynihan
Paula Galowitz

AJF:jp

Letter of October 30, 1979

[LETTERHEAD OF]

STATE OF NEW YORK
DEPARTMENT OF LAW
Two World Trade Center
New York, N.Y. 10047
Telephone: 488-3023

October 30, 1979

Re: Stenson v. Blum
78 Civ. 6044

Hon. Robert W. Sweet
United States Courthouse
Foley Square
New York, New York 10007

Dear Judge Sweet:

This letter is submitted in response to the misleading statements contained in the letter submitted on October 24, 1979 by Arthur J. Fried, counsel for plaintiff.

That letter attempts to distinguish the three cases cited in defendant Blum's letter of October 19, 1979 (*Toomey* v. *Blum*, *Everson* v. *Toia*, and *Fingland* v. *Lavine*) from the case at bar on the ground that:

> "None of those cases involved a situation in which the failure to request a fair hearing within the sixty day limitation period was caused by defendant's own failure to provide notice of intended action, as is the case here. In each of those cases, the recipients involved received timely and adequate notice of the challenged action and nonetheless failed to request review in a timely fashion."

Letter of October 30, 1979

Timely and adequate notice is only required prior to a reduction, suspension, or termination of benefits. 18 NYCRR § 358.8, 45 CFR § 206.10(a)(4). None of the challenged errors in the cases cited in defendant Blum's letter involved a reduction, suspension, or termination of benefits. (In *Toomey* v. *Blum*, the alleged error was the failure to take work related expenses into account at the time of the initial application for benefits; in *Fingland* v. *Lavine*, the alleged error was also an error in budgeting which apparently occurred at the time of the initial application; and in *Everson* v. *Toia*, the alleged error was the denial of benefits at the time of the initial application). Thus, none of recipients in the above-cited cases would have received "timely and adequate notice", and plaintiff's alleged distinction does not, in fact, exist.

Very truly yours,

ROBERT ABRAMS
Attorney General

By /s/ MARION R. BUCHBINDER
MARION R. BUCHBINDER
Assistant Attorney General

MRB:ml

cc: Arthur J. Fried, Esq.
Thomas Warren, Esq.
Henry Adler, Esq.
Ann Moynihan, Esq.

Letter of November 30, 1979

[LETTERHEAD OF]

STATE OF NEW YORK
DEPARTMENT OF LAW
Two World Trade Center
New York, N.Y. 10047
Telephone: 488-3023

November 30, 1979

Re: Stenson v. Blum, 78 Civ. 6044

Hon. Robert W. Sweet
United States Courthouse
Foley Square
New York, New York 10007

Dear Judge Sweet:

Pursuant to your request at the conference of November 16, I am writing to advise your honor of the method the State Department of Social Services (the "Department") proposes to use to restore [M]edicaid benefits to class members, and the time which the Department estimates that the restoration will take.

In order to estimate the current status and locatability of class members, the Department conducted a survey of 100 randomly selected class members in New York City whose SSI cases were closed for financial ineligibility in August, 1977. On November 7, 1979 the Department sent letters by registered mail to these 100 individuals. Replies were requested by November 16, 1979, and stamped self-addressed envelopes for the replies were enclosd. A copy of the letter is submitted herewith.

To date, 39 of these letters have been returned by the post office as undeliverable. The Department continues to receive several of these undeliverable letters daily. Eighteen replies have been returned by (or, in one case, on be-

half of) class members. The last of these replies was received on November 23rd, one week ago.

One reply reported that the addressee is deceased, and one class member who submitted a reply refused to answer any of the questions contained in the letter. The 16 remaining responses were as follows:

	Yes	*No*
1. In receipt of SSI	0	16
2. In receipt of Medicaid	3	13
3. In receipt of PA	1	15
4. Applied for MA and denied	2	14
5. Currently have unpaid medical bills and not now receiving MA and have not applied for MA and been denied	2	14

One of the two class members who reported that he had applied for MA and was denied had originally been found eligible for MA and was subsequently determined to be ineligible.

In view of the large number of letters which have been returned as undeliverable, the Department feels that sending Medicaid cards to all class members, as plaintiff's proposed judgment demands, would be highly undesirable. Furthermore, that method would result in restoring Medicaid benefits to those class members who, subsequent to the termination of their SSI benefits, were found to be ineligible for Medicaid.

The Department feels that the best approach would be for it to send letters to class members whose benefits had been terminated for reasons other than death or moved out of state advising them that if they are not currently in receipt of Medicaid, and have not applied and been found ineligible for Medicaid subsequent to the termination of their SSI benefits, they can have their Medicaid benefits restored as of the date of the judgment of this action by contacting their local social services district. The local district would verify both the identity of the class member

and whether the class member applied for MA and was denied subsequent to his/her SSI termination. The local district would then issue a Medicaid card.

Because it appears likely that many of the letters will be returned as undeliverable, it would also be advisable to require the local districts to publish the substance of the letter in local newspapers.

The Department proposes to limit the class members whose benefits could be restored to those whose SSI benefits were terminated, for reasons other than death or moved out of state, on or after January 1, 1977. The reason why the Department proposes the January 1, 1977 cut off date is that N.Y.C. has purged its automated files for the prior period, and therefore would be unable to verify whether those class members whose SSI benefits had been terminated in the prior period had subsequently applied for MA and been denied.

The [D]epartment did a computer sample to estimate the total number of class members to whom letters would be mailed. For the month of November, 1978, it was found that the SSI benefits of 3,158 class members were terminated for reasons other than death or moved out of state. Thus, there are approximately 113,688 class members whose SSI benefits were terminated from January 1, 1977 to date.

By December 28, 1979, the Department will be able to identify those class members whose SSI benefits were terminated on or after January 1, 1977 for reasons other than death or moved out of state. The Department will be able to mail letters to the last known addresses of these class members by January 18, 1980. (Temporary employees will be hired to assist in the mailing.)

The commissioners of several of the larger social services districts (Suffolk and Onondaga Counties and New York City) have advised that due to the expected number of requests for restoration of benefits, it will take them four or five weeks to mail a Medicaid card after a request for restoration of benefits has been received. The smaller

counties should be able to mail Medicaid cards within two or three weeks after the request for restoration of benefits has been received.

The Department has also considered the alternative approach of sending lists of the names of those class members whose SSI benefits were terminated on or after January 1, 1977, to the local district in which they resided at the time of the termination. The local districts would then try to locate those class members.

The Department found this approach to be completely undesirable, as it estimates that it would take anywhere from three to five months longer than the first approach and would only have marginal effectiveness. The local districts have the same last addresses for the class members that the Department has. A cross check with current public assistance recipients would be useless because public assistance recipients are categorically eligible for Medicaid, and so those class members who are currently in receipt of public assistance also have a current Medicaid card. In addition, very few class members would currently be in receipt of public assistance because, except for a few counties, the SSI standard of need exceeds the public assistance standard of need. Thus, most of those class members who were found ineligible for SSI for financial reasons would also be financially ineligible to receive public assistance.

Moreover, this approach would disrupt the application process, and may cause delays of six months or more in processing new cases.

Based on the foregoing, the Department submits that the provision set forth below should be adopted by the Final Judgment. If the Court should sign the proposed Judgment submitted by defendant Blum, the below provision would replace paragraph 13 thereof.

> "On or before January 18, 1980 the State defendant shall send a notice to all members of the plaintiff class whose SSI benefits were terminated (for a reason other

than death or moved out of state) on or after January 1, 1977. The notice will inform said class members of the terms of this [J]udgment and will advise them that if they are not currently in receipt of Medicaid benefits, and have not applied and been determined to be ineligible for Medicaid benefits subsequent to the termination of their SSI benefits, they can have their Medicaid benefits restored by contacting their local social services district. The substance of this notice shall be published in local newspapers at least twice during the week of January 20, 1980. Medicaid cards will be sent to class members within five weeks after a request for restoration of benefits is received by the local social services district."

Very truly yours,

ROBERT ABRAMS
Attorney General

By /s/ MARION BUCHDINDER
MARION BUCHBINDER
Assistant Attorney General

MB:el

cc: Arthur Fried, Esq.
The Legal Aid Society
Civil Appeals and Law Reform Unit
11 Park Place, 8th Floor
New York, New York 10007

Thomas Warren
Assistant United States Attorney
One St. Andrews Plaza
New York, New York 10007

Henry Adler, Esq.
N.Y.C. Department of Human Resources
220 Church Street
New York, New York 10013

Letter of November 6, 1979 (attached to Letter of November 30, 1979)

[LETTERHEAD OF]

NEW YORK STATE

DEPARTMENT OF SOCIAL SERVICES

40 North Pearl Street, Albany, New York 12243

BARBARA B. BLUM
Commissioner

November 6, 1979

Dear Sir or Madam:

We are surveying people who have lost eligibility for the SSI program in the past. We would appreciate your reply in the self-addressed stamped envelope contained herewith.

Yes	*No*	
( )	( )	Are you now receiving SSI?
( )	( )	Are you now receiving Medicaid?
( )	( )	Are you now receiving Public Assistance?
( )	( )	Have you applied for Medical Assistance and were denied?
( )	( )	If you have answered "no" to the above questions, do you have unpaid medical biils for which you may need assistance?

Please reply no later than *November 16, 1979.*

Sincerly,

/s/ R. F. SKERRETT
Robert F. Skerrett
Acting Deputy Commissioner
Division of Medical Assistance

Letter of December 4, 1979

[LETTERHEAD OF]

THE LEGAL AID SOCIETY
Civil Division
Civil Appeals & Law Reform Unit
11 Park Place—8th Floor
New York, N.Y. 10007
(212) 227-2755

JOHN E. KIRKLIN, Director of Litigation

December 4, 1979

The Honorable Robert W. Sweet
United States District Judge
Room 410
United States Courthouse
Foley Square
New York, New York 10007

Re: Stenson v. Blum
78 Civ. 6044

Dear Judge Sweet:

At the conference on November 16, 1979 you directed the State defendant to immediately begin identifying individuals who, since January 1, 1974, have had their Medicaid benefits terminated because of loss of S.S.I. eligibility, and to ascertain the means available for and the difficulties involved in finding the most recent addresses of these individuals, the members of the plaintiff class. The State defendant's letter of November 30, 1979, in response to the Court's directive, ignores both of these areas. Instead, the State defendant submits the results of a mailing started ten days

before the conference but curiously not mentioned to either the Court or to plaintiffs' counsel. The "results" of this mailing are of little, if any, benefit to the Court in providing current Medicaid benefits and corrective notices to class members.[1]

At the November 16 conference plaintiffs' counsel suggested that current addresses of former S.S.I. recipients might be obtained from Food Stamp or Social Security rolls.[2] These alternatives, which would inevitably locate many more class members than merely sending letters to addresses that have not been updated since the illegal Medicaid terminations,[3] have not been pursued by the State defendant. Defendant Blum's letter makes it clear that no attempt to obtain current addresses of class members has been made.

In spite of the failure to investigate the areas of interest to the Court, counsel for defendant Blum proposes relief more limited than that already granted by the Court, and claims that the results of the mailing indicate that such relief is appropriate. Before discussing the defendant's conclusions, plaintiffs' counsel must register a strong objection to this unauthorized contact with our clients in apparent violation of Ethical Consideration 7-18 and Disciplinary Rule 7-104 of the Code of Professional Responsibility. Had plaintiffs' counsel been consulted we would have welcomed the opportunity to work with the State in developing a mailing that would generate information to assist

1. Annexed hereto is a recent decision of the Northern District of Illinois requiring notification to class members of the availability of State administrative procedure to obtain wrongfully withheld benefits.

2. Other, albeit more time consuming, methods of contacting class members at current addresses would be to check telephone directories or voter registration rolls.

3. All three of the named plaintiffs in this action are currently in receipt of Social Security benefits.

the Court in effectively locating class members without placing an undue burden on the State defendant. As it was, the method chosen by the defendant is of little or no value in finding current addresses for class members.

A complete response to the State defendant's letter is not possible without the full facts underlying the conclusions reached. Plaintiffs' counsel therefore request that the State defendant provide the names and addresses of the 100 selected class members, the responses received, and access to their individual case files.

Even without this information a number of observations can be made about the results of the mailing. Approximately sixty percent of the letters sent out were delivered, even though the addresses used were more than two years old. Thus, a large portion of the plaintiff class can be located with very little effort on the part of the State defendant.

Almost one-third of the class members receiving the letter responded. In light of the fact that the letter did not indicate a benefit to or the necessity of responding, was not provided in Spanish and requested a response in an exceedingly short time, this is a remarkably high response. Furthermore, of those who responded, only a small percentage have had their Medicaid benefits restored. This proves the inaccuracy of the State defendant's claim that most class members are already back on Medicaid, and thus underscores the importance of evaluating all possible methods of locating class members.

The State defendant suggests that only individuals illegally terminated from the Medicaid program since January 1, 1977 be restored to the rolls, although the Court has already ruled otherwise, because prior to that date there are no automated records of Medicaid applications and

denials. Speculation that a few ineligible individuals[4] may receive Medicaid benefits for a short period of time cannot support denial of these benefits to the vast majority of aged, blind and disabled class members. Moreover, the denial of a Medicaid application subsequent to termination of S.S.I. benefits should not preclude restoration of Medicaid benefits[.] First, this would result in a denial of Medicaid benefits without those safeguards that this Court has already ruled are required. Second, the New York City Bureau of Medicaid assistance processes "regular" Medicaid cases in one unit and "spend-down" cases in another. Individuals who show up on defendant's records as having been denied Medicaid may very well have been denied on the basis of excess income, even though they have medical expenses that render them eligible on a spend-down basis. Many class members, like Mrs. Stenson, lose eligibility for S.S.I. for financial reasons and are over the "regular" Medicaid income limits but are still eligible on a spend-down basis.

The letter mailed by defendant Blum also asks for information about outstanding medical bills. The existence of outstanding medical bills has no direct relationship to Medicaid eligibility. Even so, the responses show that two of the ten or eleven individuals covered by this question reported outstanding medical bills. Others may be experiencing great hardship in order to pay their medical bills and ensure continued treatment from doctors, hospitals and clinics.

Much more could be said about the inadequacies of the "survey" detailed in Ms. Buchbinder's letter of November 30, 1979. For example, only individuals whose S.S.I. cases

4. Only 2 of 13 individuals not presently receiving Medicaid responded that they have previously been denied. From the information provided it cannot be determined whether this was before, during or after the S.S.I. cutoffs or, in fact, whether the responses refer to the Medicaid terminations in issue here.

were closed for financial ineligibility were polled. However, the point being made is already abundantly clear. Since the November 16 conference, the State defendant has made no attempt to find a method calculated to locate class members at their current address. The defendant's mailing was certainly not designed for this purpose, p rhaps because it was made before the conference on November 16, 1979.

Because the Court has already directed that Medicaid benefits be restored to all class members and the State defendant has made no showing that by using the most recent addresses from their files, the Food Stamp rolls or the Social Security Administration's records the vast majority of class members cannot be reached, despite being given the opportunity to make such a showing, the Court should enter Judgment directing the [S]tate to immediately restore Medicaid benefits to members of the plaintiff class. This can be accomplished by adding to the end of paragraph 11 of plaintiffs' proposed Judgment the following language:

> Benefits shall be restored by mailing current Medicaid cards to each class member, at the most recent address obtained from defendant Blum's files, the Food Stamp rolls and the records of the Social Security Administration.
>
> Defendant Blum shall search the appropriate telephone directories and voter registration rolls for the addresses of any class members whose Medicaid cards are returned by the post office as undeliverable after being sent in the above manner. At the end of each month subsequent to the entry of this Judgment, defendant Blum shall submit reports to plaintiffs' counsel and the Court on the progress of this restoration program. These reports shall include:

(a) the total number of class members entitled to restoration under this paragraph;

(b) the number of class members sent Medicaid cards during the prior month, broken down by source of address;

(c) the number of Medicaid cards returned as undeliverable during the prior month, broken down by source of address.

Very truly yours,

Ann Moynihan
Arthur J. Fried
Paula Galowitz

AJF:jp

cc: Thomas Warren
Marion Buchbinder

Letter of December 12, 1979

[LETTERHEAD OF]

STATE OF NEW YORK
DEPARTMENT OF LAW
Two World Trade Center
New York, N.Y. 10047
Telephone: 488-3023

ROBERT ABRAMS
Attorney General

December 12, 1979

Re: Stenson v. Blum
78 Civ. 6044

Hon. Robert W. Sweet
United States Courthouse
Foley Square
New York, New York 10007

Dear Judge Sweet:

Plaintiff has suggested that the State use food stamp and social security rolls to determine the current addresses of class members. The State feels that neither method is appropriate.

The State does not have food stamp rolls; those rolls are only in the local districts. Requiring these districts to research current addresses would result in a delay of several months in sending out notices, and would cause inordinate delays in the daily business carried on by the districts.

Neither the State nor the local districts have Social Security rolls. Those rolls are located at the Federal Social Security Administration's ([SSA]) Baltimore office. The Department has been advised by Steve Cesareo, Assistant

Director of SSA's New York SSI Bureau, that the method which could probably be employed to match social security rolls with the list of class members would be for the State to send the list of class members to the SSA Baltimore office, and have SSA do a computer match. Mr. Cesareo advised that, optomistically, this process could take two months; but from his experience with SSA he feels that a more reasonable estimate is five to nine months. The State would have to send a written request to Albert Bernzweig, the Assistant Regional Commissioner of SSA's SSI bureau, to receive confirmation that the above method is possible, and for permission to proceed. Mr. Cesareo feels that permission would probably be granted.

I have been advised by the Department that, apparently misunderstanding your honor's directions at our last conference, they have been proceeding with the necessary procedures to mail out notices. The statement in my letter to the Court of November 30, 1979, that the notices could be mailed by January 18, 1980, was based on the Department's assumption that the method of notification suggested in that letter would be used, and the procedure already begun could continue uninterrupted. The Department has already drafted three bilingual letters (one for use in NYC and two for the other districts), and was prepared to send them to the printer yesterday to have negatives made. I advised them to wait.

It is estimated that it will take 24 working days from the date that the printer receives the letters to get them in the mail, if the letters are only one page long. It will take 7 working days for the printer, an outside contractor, to prepare negatives of the notices, and two days thereafter for the Department to print the notices on the computer. The remaining time is needed for addressing and stuffing envelopes, sorting, zip coding, and stamping.

Copies of the English section of two of the letters already drafted are enclosed herewith. On the finished ver-

sions, Spanish translators [sic] appear on the same page. One of the enclosed letters is the notice which would be used for all class members in NYC. Two letters have been prepared for use in the other districts, as some districts have indicated a preference for having the class member notify them by telephone, and some districts prefer notification by mail. The telephone version is enclosed herewith. The mail version will have the district's address instead of a space for the district's telephone number.

If the Court should approve the State's proposed method of notification but require that new letters be drafted, it will take an additional two days to translate the new language into Spanish, because the translation is made in NYC and then sent to Albany. If the letters remain one page in length, it will take approximately 24 working days from the date that the letters are sent to the printer until the date the letters are actually mailed. If the letter is long than one page, it will take longer.

Very truly yours,

ROBERT ABRAMS
Attorney General

By
MARION BUCHBINDER
Assistant Attorney General

MB:lm
Encs.

cc: Arthur Fried, Esq.
The Legal Aid Society

Thomas Warren
Assistant U.S. Attorney

Henry Adler, Esq.
N.Y.C. Department
of Human Resources

Letter of December 17, 1979

[LETTERHEAD OF]

THE CITY OF NEW YORK
HUMAN RESOURCES ADMINISTRATION
STANLEY BREZENOFF, *Administrator*

JOSEPH M. ARMSTRONG
General Counsel

December 17, 1979

Hon. Robert W. Sweet, Judge
United States District Court
for the Southern District
Federal Court House, Foley Square
New York, New York

Re: Stenson
78 CIV. 6044

Dear Judge Sweet:

I submit this letter to clarify the position of the City Defendant. Notices as suggested by the State Defendant may tend to confuse members of the class and would create an undue, unnecessary administrative expense. Also, plaintiff's suggestion that Medicaid cards be given to members of the class would cause a fiscal nightmare which neither the City nor the State can afford.

A survey has been done of clients terminated from Medicaid during the month of February, 1977. A sample (approximately 1000) taken of those terminations revealed the following: Over 60% of those terminated subsequently secured Medicaid; the 30% that did not receive Medicaid coverage were broken-down further to reveal that 56% of the 30% were deemed ineligible by the Social Security

Administration; they were either found not to be disabled or they refused to take a physical examination.

It is, of course, presumed, and no one has stated otherwise, that the Social Security Administration gave all the individuals terminated from Medicaid during February, 1977 notice and the right to a hearing upon terminating their Supplemental Security Income ("SSI"). Twenty-one percent of the 30% mentioned above were administratively terminated by the Social Security Administration, that is, their cases were immediately reopened with a new case number. Ten percent of this 30% either voluntarily withdrew from the Supplemental Security Income program or moved out of the State or country. This leaves 13% of the 30%, a minuscle [sic] fraction of the total that are unidentified (some of whom are part of the class in this proceeding).

As has been previously stated, the nature of the Medicaid program is such that the overwhelming majority of persons in The City of New York who require, but are unable to afford, medical assistance not only have the opportunity to get such assistance but are referred by those from whom they seek assistance to our Office of Medical Assistance. Hospitals, clinics, pharmacies and many doctors offices are not only aware of, but have applications for, Medicaid, which they help the client to fill out and forward to our Office. Every hospital in The City of New York has Medicaid applications. Every inpatient who does not have sufficient economic means is aided in preparing an application, which is submitted by the hospital to our office. It is, therefore, not only unnecessary, but duplicative to forward notices to members of the class.

I appreciate the fact that plaintiffs sought to inform the Court of the manner in which our Medicaid program operates; however, the information supplied to the Court

does not reflect an accurate understanding of how Medicaid operates.

One Medicaid location makes the determination of eligibility. If a client meets all of the eligibility criteria, including the monetary guidelines, they are accepted for full Medicaid coverage. The client is so informed and a Medicaid card is issued. If a client meets all the eligibility criteria but has income in excess of the monetary guidelines, the client is so informed and is told that Medicaid coverage will commence after the client has incurred medicaid-covered medical expenses in excess of that portion of his income which is above the Medicaid income level. For example, a family of one with an income not in excess of $275.00 per month and meeting all other eligibility criteria is entitled to Medicaid. That same person with an income of $300 per month and meeting all other eligibility criteria would have to incur Medicaid-covered medical expenses exceeding $25.00 before securing Medicaid coverage. The client is eligible but would only receive Medicaid in those months in which the "spend down" has occurred. The separation of functions in our Office occurs only to monitor those who must "spend down" and only to insure that they receive benefits after "spend down" has occurred.

The third paragraph on page 3 of plaintiff's letter, the sentence commencing with the word "Moreover", seems to imply that Medicaid benefits should have been given to those individuals who have completed an application and been denied coverage. It is hard to imagine why this group would, after an application review and denial, be given Medicaid coverage. The last full paragraph on page 4 of plaintiff's letter seems to create its own inconsistencies. It seems to state that the Court has already ordered restoration of Medicaid benefits to the class (a fact that I do not recall) and then in the same paragraph requests the Court to order this type of relief.

Letter of December 17, 1979

To avoid undue and unnecessary administrative expenses and to avoid confusion, while apprising those few persons affected of the rights afforded to them by decision of this Court, the best course would be to have announcements made on the radio and notices published in the newspapers. This would probably be the least costly and most effective way of proceeding.

Very truly yours,

/s/ HENRY M. ADLER
HENRY M. ADLER
Deputy General Counsel
Litigation

cc: Marian [sic] Buchbinder, Esq.
Attorney for State Defendants

Thomas Warren, Esq.
Attorney for Department of
Health, Education and Welfare

Arthur Fried, Esq.
Attorney for Plaintiffs

Letter of December 18, 1979

[LETTERHEAD OF]

THE LEGAL AID SOCIETY
Civil Division
Civil Appeals & Law Reform Unit
11 Park Place—8th Floor
New York, N.Y. 10007
(212) 227-2755

JOHN E. KIRKLIN, Director of Litigation

December 18, 1979

The Honorable Robert W. Sweet
Room 410
United States Courthouse
Foley Square
New York, N.Y. 10007

Re: Stenson v. Blum 78 Civ. 6044

Judge Sweet:

Plaintiffs submit this letter for the sole purpose of responding the [sic] the allegation in Marion Buchbinder's letter of December 12, 1979 that a computer match of Social Security rolls with a list of class members would take from five to nine months. Considering the fact that the Human Resources Administration runs monthly computer matches with the current Social Security and S.S.I. files and periodic computer matches with the Section 8 Rent Subsidy files,[1] *see* New York City Department of Social Services Income Maintenance Procedures Manual, §C-5, pp. 9, 11-12, 15 (copies annexed hereto) as well as a number of other

1. The Section 8 Rent Subsidy files should also be used by the defendant to obtain current addresses of class members.

routine computer matches, plaintiffs find incredible the assertion that it would take between five to nine months to adjust these programs for use in this case. For these reasons, in determining what method should be used to restore class members to the Medicaid rolls and notify them that State administrative procedures are available for establishment of past medicaid eligibility, this Court should not place any weight on the facts alleged in Ms. Buchbinder's letter without requiring the State defendant to establish such facts at a hearing.

If such a hearing proves necessary, plaintiffs request that it be scheduled as soon as practicable to avoid further delay in the implementation of this Court's decision of September 18, 1979.

Very truly yours,

Arthur J. Fried
Paula Galowitz
Ann Moynihan

cc: Marion Buchbinder
Department of Law of the
State of New York
Two World Trade Center
New York, N.Y. 10047

Thomas Warren
Assistant U.S. Attorney
One St. Andrews Plaza
New York, N.Y. 10007

Henry Adler
Office of Legal Affairs
Human Resources Administration
220 Church St.—6th Floor
New York, N.Y. 10013

Letter of December 18, 1979

NYC Department of Social Services Income Maintenance Procedures Manual (annexed to Letter of December 18, 1979)

Date Iss./Rev. 2/1/78

NYC DSS IM PROCEDURES MANUAL

Computer Matches

A Computer Match is a method whereby the Department's computer is utilized to compare a listing of names from any public or private agency or employer with a master listing of all public assistance recipients.

The computer is programmed to indicate those names common to both listings on a printout sheet, IBM Card or label which is generated by the computer.

The purpose of these matches is to identify recipients in receipt of overpayments due to unreported income or other financial factors, so that appropriate corrective action can be taken. Computer Matches are also used to identify duplication of public assistance and pinpoint conflicting data submitted by the IM Centers on Form W-677.

Income Clearance Program (ICP)

Computer matches are coordinated by the Income Clearance Program (ICP). ICP is a section within the Office of Operation Support (OOS) and is located in Central Office. ICP makes arrangements to obtain computer tapes containing the employment or benefit rolls from public or private agencies and employers. ICP is also responsible for acting on the information obtained from the computer in one of the following ways:

Type A—Processing closings or reductions as required and submitting information related to the action taken to the IM Center for follow-up.

Type B—Mailing call-in letters to recipients, requiring that they report to the IM Center for an interview so that corrective action can be taken by the IM Center.

OASDI Match

A monthly computer match which compares changes in the Federal Government's Social Security Payments File with the current public assistance master file.

Where the income from OASDI results in a budget surplus, ICP will process the case for closing through CCCP.

In situations where a budget deficit continues to exist, ICP will initiate Form M-3c-a for a budget reduction.

Based on the results of the computer match, ICP will centrally initiate corrective action as required. IM Center staff are to perform the follow-up activities described in the section entitled, "Type A Computer Matches", on pp. 3-6 of this manual and the special instructions given below.

Special Instructions:

ICP also centrally readjusts the budget of recipients currently in receipt of OASDI whenever a general financial change is instituted. Special serial number 171717 indicates a centralized rebudgeting of cases in receipt of OASDI which are not to be confused with budget changes made as result of this match.

Special Forms: None

Special Serial Number:

The special serial number, 733333 will appear in Element 56 of Form W-677A, turnaround document.

Letter of December 18, 1979

SSI MATCH

A monthly computer match which compares those persons in receipt of SSI with the current public assistance master file. Timely notice is not required when discontinuing or decreasing assistance based on receipt of SSI.

If the income from SSI results in a budget surplus, ICP will process the case for closing.

In situations where a budget deficit continues to exist, ICP will process the reduction.

ICP will also budget other income discovered by the match, such as, OASDI, Veteran Benefits, and Disability Benefits. If there is no deficit upon rebudgeting, the case will be closed. A timely notice will be sent to the recipient by ICP prior to discontinuing or reducing assistance based on receipt of such "other" income.

Based on the results of the computer match, ICP will centrally initiate corrective action as required. IM Center staff are to perform the follow-up activities described in the section entitled "Type A Computer Matches", on pp. 3-6 of this manual and the special instructions given below.

Special Instructions

For ADC and ADC-U cases, the SSI recipient will be financially removed by ICP.

For single HR cases with no budget deficit the case will be closed by ICP.

For single HR cases with a budget deficit, a reduction will be processed by ICP.

For multiple person HR cases, a reduction will be processed by ICP.

Letter of December 18, 1979

Form W-677A will *not* accompany the IM record to the Statistical Unit as ICP has already inputted the decrease or removal action. The processing group is to process Form W-710 for a removal/closing and annotate it with the statement "ICP closing", "ICP removal".

Special Forms:

Form SSI-NY-23 which is completed by ICP will accompany basic Forms W-677A, W30S and Notice of Discontinuance on all ADC and ADC-U cases. It is to be filed in the IM record. Further information pertaining to Form SSI-NY-23 may be found in the Supplemental Security Income Manual, S-2.

Special Serial Number:

The serial number 133333 will appear in element 56 of Form W-677, turnaround document.

HR Address Verifications Match

A periodic Computer Match designed to identify all buildings in the city of New York in which ten or more HR recipients reside. *The Office of Eligibility Control, located in Central Office, coordinates all activity related to this match.*

Staff from the Office of Validation and Quality Control visit each of these addresses to verify whether or not the recipient currently resides at that address.

If the field visit reveals that the recipient does reside at the listed address, no action is taken.

If the field visit reveals that the recipient does *not* reside at the listed address, and a CRT clearance does not indicate a change of address, the case will be processed centrally for closing through CCCP.

Upon receipt of centrally initiated Forms W-913, IM Center staff are to follow the instructions given in the section entitled, "Type A Computer Matches", on pp. 3-6 of this manual.

Special Instructions: None

Special Forms: None

Special Instructions: None

JA243

Letter of December 18, 1979

SECTION 8 RENT SUBSIDY MATCH

A periodic computer match which compares the NYCHA listing of recipients whose application for Section 8 rent subsidies have been approved with the public assistance master file. This match is used to identify recipients who receive subsidies and to rebudget their shelter allowance.

If the budgeting of the subsidy results in a budget surplus, OOS will process the case for closing through CCCP.

In situations where a budget deficit continues to exist, OOS will initiate Form M-3c-a for a budget reduction.

Based on the results of the computer match, OOS will centrally initiate corrective action as required. IM Center staff are to perform the follow-up activities described in the section entitled, "Type A Computer Matches," on pp. 3-6 of this manual and the special instructions given below.

SPECIAL INSTRUCTIONS

SPECIAL FORMS: Form W-30C

SPECIAL SERIAL NUMBER:

The Special Serial Number, 333335 will appear in element 56 of Form W-677A, turnaround document.

• • •

Letter of December 28, 1979

[LETTERHEAD OF]

STATE OF NEW YORK
DEPARTMENT OF LAW
Two World Trade Center
New York, N.Y. 10047
Telephone: 438-3023

December 28, 1979

Re: Stenson v. Blum
78 Civ. 6044

Hon. Robert W. Sweet
United States Courthouse
Foley Square
New York, New York 10007

Dear Judge Sweet:

Pursuant to paragraph 17 of the Final Judgment in the above entitled action, signed December 20, 1979, I have enclosed a copy of the notice which the State defendants propose to send to class members pursuant to paragraph 11 of the Final Judgment. The notice will be bilingual. As indicated on the copy enclosed herewith, the notice sent to class members in some upstate districts may have the district's telephone number in place of the district's address.

I would appreciate if you would let me know whether this notice is acceptable as quickly as possible so that the

Letter of December 28, 1979

State defendant will be able to print and send it to class members within the time required by the Final Judgment.

Very truly yours,

/s/ MARION BUCHBINDER
MARION BUCHBINDER
Assistant Attorney General

MB:el

cc: Arthur Fried, Esq.
Legal Aid Society
11 Park Place, 8th Floor
New York, New York 10007

Henry Adler, Esq.
N.Y.C. Human Resources Administration
220 Church Street
New York, New York 10013

Thomas Warren
Assistant United States Attorney
One St. Andrew's Plaza
New York, New York 10007

Letter of December 28, 1979

Defendant's Proposed Notice to Class Members (attached to Letter of December 28, 1979)

*New York City—Medical Assistance Program
330 West 34th Street
New York, New York 10001

Attention: H. Rosenblum

NOTICE:

IF YOU ARE NOW RECEIVING A GOLD SSI CHECK, PUBLIC ASSISTANCE, A MEDICAID CARD, OR ARE IN A LONG TERM CARE INSTITUTION OR HAVE APPLIED FOR MEDICAID AND HAVE BEEN DENIED WITH NOTICE OF YOUR RIGHTS TO A FAIR HEARING, PLEASE IGNORE THIS NOTICE.

Our records show that you no longer receive a gold SSI monthly check or Medicaid.

A Federal Court has decided that your Medicaid closing may not have been correct. If you want Medicaid and are NOW NOT RECEIVING IT, please return this letter by February 29, 1980 to the above address.

If you write and ask for Medicaid, you will receive it retroactive to December, 1979 until your case is reviewed. These are the only benefits available under this court order. Any other retroactive benefits, to the extent that such benefits are available, must be sought through State administrative procedures.

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* Districts exclusive of New York City will have either a telephone number or an address.

Letter of December 31, 1979

[LETTERHEAD OF]

THE LEGAL AID SOCIETY
Civil Division
Civil Appeals & Law Reform Unit
11 Park Place—8th Floor
New York, N.Y. 10007
(212) 227-2755

JOHN E. KIRKLIN, Director of Litigation

December 31, 1979

The Honorable Robert W. Sweet
Room 410
United States Courthouse
Foley Square
New York, New York 10007

Re: Stenson v. Blum, 78 Civ. 6044

Judge Sweet:

Plaintiffs submit the enclosed notice in response to the one submitted by the State defendant on December 28. The State's notice is not only vague and unclear, but it also places the burden on the class members to ensure restoration of Medicaid coverage. Plaintiffs' notice adequately explains the relief provided by the Court's judgment, and informs class members how to obtain that relief.

In addition, the notice should contain a telephone number for class members to call if they have any questions

about the notice. Plaintiffs are willing to meet with the State defendant to arrange for such a service. Finally, the envelope mailed to class members should bear the notation "Address Correction Requested", as the post office will provide that information, where available.

Very truly yours,

Arthur J. Fried
Paula Galowitz
Ann Moynihan

Enclosure
cc: Marion Buchbinder
Henry Adler
Thomas Warren

Letter of December 31, 1979

Plaintiff's Proposed Notice for Class Members (attached to Letter of December 31, 1979)

MEDICAID NOTICE

TO BE SENT TO CLASS MEMBERS NOT CURRENTLY RECEIVING MEDICAID BENEFITS.

Dear Sir or Madam:

YOU WILL BE RESTORED TO MEDICAID IF YOU COMPLETE AND RETURN THE ENCLOSED POST-CARD.

As a result of a court decision you now have a right to a Medicaid card. You are one of the class members in that case because your Medicaid benefits were stopped when you were cut off S.S.I.

When you lost your S.S.I. benefits you should have continued to receive Medicaid until your case was reviewed to see whether you were still eligible for Medicaid. Since this was not done, you have a right to Medicaid until we have completed a review of your case. *To get a Medicaid card you need only complete and return the enclosed, stamped self-addressed card.*

We will then send you a Medicaid card until after review of your case is completed. After the review, we will tell you if we intend to reduce or stop your Medicaid. At that time, you will be told of your rights to contest any decision to stop or reduce your Medicaid.

Our review of your case will determine only if you are *now* eligible for Medicaid. Since you were without Med-

icaid benefits in the *past*, you may wish to have a hearing on whether you were wrongly denied those past Medicaid benefits. To this you must request a hearing now. A hearing request is attached for your convenience. You will want to request a hearing about your past Medicaid benefits if you incurred medical expenses *after you were cut off S.S.I*[.] *and were not covered by Medicaid.*

Your request for a hearing about your past Medicaid should be sent to: The New York State Department of Social Services, Fair Hearing Section, 40 North Pearl Street, Albany, New York.

Letter of December 31, 1979

Request for a Fair Hearing (attached to Letter of December 31, 1979)

REQUEST FOR A FAIR HEARING

Fair Hearing Section
New York State Department of Social Services
40 North Pearl Street
Albany, New York 12243

Sir or Madam:

I request a fair hearing. When I was cut off S.S.I. my Medicaid was stopped. I was never given advance notice or the opportunity for a hearing before my Medicaid was cut off and no determination was made on my eligibility for Medicaid after my S.S.I. benfits were stopped. I was without Medicaid benefits for a period of time and had medical expenses that I had to pay for or which still remain unpaid.

My name is _____

My address is _____

My Social Security Number is _____

Please send me a date for a hearing, and send me copies of all documents that will be used at the hearing.

POST CARD

NAME _____

ADDRESS _____

SOCIAL SECURITY NO. _____

I want my MEDICAID benefits restored.

Defendant Blum's (First) Notice of Appeal

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

SIRS:

PLEASE TAKE NOTICE that defendant Blum hereby appeals to the United States Court of Appeals for the Second Circuit from the Final Judgment of this Court dated December 20, 1979, entered on December 26, 1979, granting class certification and granting plaintiff injunctive and declaratory relief against defendant Blum's policy of terminating, reducing or suspending [m]edicaid benefits after the Federal government has notified the State that an individual's S.S.I. benefits have been reduced, terminated, or suspended without making an *ex parte* determination of the continued medicaid eligibility of that individual, providing timely and adequate notice of any proposed reduction, termination or suspension of medicaid benefits; providing that individual with an evidentiary hearing, if such hearing is timely requested; and rendering a decision after a timely requested hearing. Defendant Blum appeals from

each and every part of the Final Judgment insofar as it granted relief to the named plaintiff and plaintiff class.

Dated: New York, New York
January 25, 1980

Yours, etc.,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Defendant Blum

By /s/ MARION R. BUCHBINDER

MARION R. BUCHBINDER
Assistant Attorney General
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-3023

To: THE LEGAL AID SOCIETY
Civil Appeals and Law
Reform Unit
11Park Place—8th Floor
New York, New York 10007

ROBERT B. FISK, JR.
United States Attorney for
the Southern District of New York
One St. Andrews Plaza
New York, New York 10007

JOSEPH M. ARMSTRONG
Special Assistant Corporation
Counsel
220 Church Street
New York, New York 10013

Order (Regarding Notice to Class)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

78 Civ. 6044 (RWS)

ELLEN STENSON, individually and on behalf of all other persons similarly situated,

Plaintiff,

vs.

BARBARA BLUM, individually and in her capacity as Commissioner of the New York State Department of Social Services, *et alia,*

Defendants.

IT IS HEREBY ORDERED that the notice to be sent by the State defendant in accordance with paragraphs 11 and 17 of the Final Judgment entered in this action on December 20, 1979 shall be as follows:

MEDICAID NOTICE

Dear Sir or Madam:

YOU WILL BE RESTORED TO MEDICAID IF YOU COMPLETE AND RETURN THE ENCLOSED POST-CARD.

As a result of a court decision you now have a right to a Medicaid card. You are one of the class members in that case because your Medicaid benefits were stopped when you were cut of [sic] S.S.I. without notice or a hearing.

Order (Regarding Notice to Class)

When you lost your S.S.I. benefits you should have continued to receive Medicaid until your case was reviewed to see whether you were still eligible for Medicaid. Since this was not done, you have a right to Medicaid until we have completed a review of your case. *To get a Medicaid card you need only complete and return the enclosed, self-addressed card.*

We will then send you a Medicaid card until after review of your case is completed. After the review, we will tell you if we intend to reduce or stop your Medicaid. At that time, you will be told of your right to contest any decision to stop or reduce your Medicaid. Our review of your case will determine only if you are *now* eligible for Medicaid.

These are the only benefits available under this court action. Any other retroactive benefits, to the extent that such benefits are available, must be sought through State administrative procedures.

Dated: New York, New York
January 4, 1980

/s/ Robert W. Sweet

Robert W. Sweet
U.S.D.J.

Plaintiff's Notice of Motion for an Order Pursuant to Rule 70

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

PLEASE TAKE NOTICE that upon the annexed affirmation of Arthur J. Fried, dated February 8, 1980, plaintiffs' brief in support of this motion and all prior proceedings and papers herein, the undersigned will move this Court, before the Honorable Robert W. Sweet, in Room 410 at the United States Courthouse, Foley Square, New York, New York on February 22, 1980 at 2:00 o'clock p.m. or as soon thereafter as counsel can be heard for an order, pursuant to Rule 70 of the Federal Rules of Civil Procedure, adjudging defendant Barbara Blum in contempt of this Court's judgment of December 26, 1979 and directing said defendant to immediately identify and restore Medicaid benefits to all those terminated in violation of the judgment and to pay to each class member terminated from Medicaid benefits in violation of the judgment the sum of two hundred (200) dollars, and for an order granting such other and further relief as this Court deems just and proper.

Dated: New York, New York
February 8, 1980

Respectfully submitted,

/s/ ARTHUR J. FRIED
KALMAN FINKEL
Attorney-in-Charge
The Legal Aid Society
Civil Division

[LIST OF PARTIES OMITTED]

Affirmation of Arthur J. Fried, in Support of Rule 70 Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

78 Civ. 6044 (RWS)

ELLEN STENSON, etc., et al.,

Plaintiffs,

against

BARBARA BLUM, etc., et al.,

Defendants.

Arthur J. Fried, an attorney admitted to practice law in the State of New York, affirms under penalty of perjury pursuant to Rule 2106 of the New York Civil Practice Law and Rules that:

1. I am an attorney admitted to practice law in the United States District Court for the Southern District of New York. I am of counsel to John E. Kirklin of The Legal Aid Society, one of the attorneys for plaintiffs herein.

2. I make this affirmation in support of plaintiffs' motion for an order adjudging defendant Blum in contempt of this Court's judgment of December 26, 1979 in the above matter.

3. On December 26, 1979 this Court entered judgment herein enjoining Barbara Blum, Commissioner of the New York State Department of Social Services, from reducing, terminating or suspending the

> Medicaid benefits of any individual after the Federal government has notified the State that such individu-

al's SSI benefits have been reduced, terminated or suspended without:

(a) conducting an *ex parte* determination of that individual's Medicaid eligibility, independent of such individual's eligibility for SSI;

(b) providing that individual with timely and adequate notice of intent to reduce, suspend or terminate Medicaid benefits;

(c) according those individuals notified of a proposed termination, reduction or suspension of Medicaid benefits an opportunity for an evidentiary hearing, if such hearing is timely requested; and

(d) rendering a decision after a timely requested hearing,

as required by Title XIX of the Social Security Act, 42 U.S.C. §§1396-1396i, and the regulations promulgated thereunder, specifically 42 C.F.R. §§431.210, 431.211, 431.220(a)(2) and 431.230, and as further required by applicable New York State regulations, 18 N.Y.C.R.R. §§358.4(a)(4) and 358.8.

Judgment §14.

4. On February 4, 1980 I received a telephone call from Paul M. Ryther, an attorney employed by Southern Tier Legal Services, Bath, New York. Mr. Ryther informed me that one of his clients, Permelia Zimmer, had received a notice, dated January 15, 1980, stating that she would not receive future Medicaid benefits because she was no longer eligible for Supplemental Security Income (S.S.I.) benefits.

5. On February 6, 1980 I received in the mail a copy of the notice sent to Ms. Zimmer. A copy of this notice is annexed hereto as Exhibit 1.

Affirmation of Arthur J. Fried, in Support of Rule 70 Motion

6. On February 7, 1980 I received a letter from Joan Schmukler, an attorney with Mid-Hudson Legal Services, Inc., informing me that the Sullivan County Department of Social Services was likewise violating the *Stenson* judgment. Annexed hereto as Exhibit 2 is a notice, dated January 18, 1980, received by one of Ms. Schmukler's clients informing him that his Medicaid case would be closed because his S.S.I. benefits had ceased.

7. As these notices establish, defendant Blum has failed to implement paragraph 14 of the Court's judgment.

WHEREFORE, I respectfully request that this Court adjudge defendant Blum in contempt of the Court's judgment of December 26, 1979, direct defendant Blum to immediately identify and restore Medicaid benefits to all those terminated in violation of the Court's judgment, and further direct defendant Blum to pay each individual whose Medicaid benefits were terminated in violation of said judgment the sum of two hundred (200) dollars.

ARTHUR J. FRIED

Letter of January 15, 1980

[LETTERHEAD OF]

DEPARTMENT OF SOCIAL SERVICES

SARAH A. CURTIS, Commissioner

County of Steuben
Bath, New York 14810

Telephone 607-776-7611

Date: January 15, 1980

Permelia Zimmer
Maryville Home
R.D. #1, Braisted Road
Avoca, New York 14809

Dear Ms. Zimmer:

We have been notified that you are no longer eligible for benefits under Supplemental Security Income. Thus, your Medical Assistance Identification Card will not be issued after 1/31/80.

If you wish to apply for Medical Assistance only, please contact the Steuben County Department of Social Services; Box 631; Bath, New York 14810. Phone: 776-7611.

Very truly yours,

SARAH A. CURTIS,
County Commissioner

Letter of January 18, 1980

SULLIVAN COUNTY
DEPARTMENT OF SOCIAL SERVICES

MURIEL O'CONNOR, Commissioner
P.O. Box 231, Liberty, New York 12754

Phone: 292-4900

Date: 1/18/80

Case No. SSI 31427

CERTIFIED MAIL
Return Receipt Requested

Paul Spillman
Kinnebrook Park
Monticello, N. Y. 12701

Dear Client:

The Social Security Administration has ceased your Supplemental Security Income (SSI) as of 1/31/80. As a result, we must close your Medical Assistance case. If you are in possession of a MASSI card that has coverage types on it *exceeding the above date,* an envelope will be provided with this letter and we will ask that you return it to us immediately. _____. You cannot legally continue to use this card after this date. If you do, you would be subject to Legal Action for reimbursement to this department.

Letter of January 18, 1980

If you wish to continue your Medicaid you may apply for it at our office here in Liberty, ~~or at the County Government Center in Monticello. The hours in Monticello are 9:00 to 12:30 on Tuesdays and Fridays only~~. If you wish to come to Liberty you must call for an appointment.

Your cooperation will be greatly appreciated.

Very Truly yours,
Department of Social Services

Muriel O'Connor
Commissioner

BY: MEDICAID DIVISION
MA/rs
SSI—Extended care

Affidavit of Richard T. Cody in Opposition to Plaintiff's Contempt Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

State of New York)
County of Albany) ss:

RICHARD T. CODY, being duly sworn, deposes and says as follows:

1. I am the Director, Eligibility and WMS Interface Sections, Division of Medical Assistance, New York State Department of Social Services. As such, I am responsible for directing and securing compliance by the New York State fifty eight Social Services Districts with the Court's injunction. I make this affidavit in opposition to plaintiffs' motion to hold Commissioner Blum in contempt.

2. On or about November 20, 1979, more than a month prior to entry of the Court's judgment, the Department sent a mailgram to all [S]ocial [S]ervices [D]istricts directing them to comply with the Court's decision. This mailgram stated that pending release of an Administrative Directive, "districts shall not terminate Medicaid eligibility of any person who would be terminated because of loss of SSI benefits". A copy of this mailgram is attached hereto as Exhibit "A".

3. The Department is in the process of releasing an Administrative Directive setting forth the procedures required to make an independent determination of Medicaid

eligibility, and the contents of a timely and adequate notice of termination of Medicaid benefits including a recipient's fair hearing rights. Social Services Districts are still required to comply with the November 20, 1979, mailgram until release of the Administrative Directive.

4. I or my staff have had conversations with various district commissioners wherein these commissioners had indicated that they were in full compliance. These conversations have taken place at regional commissioner meetings wherein these commissioners have inquired as to the status of the proposed Administrative Directive.

5. I had no reason to suspect that any district was out of compliance until Counsel notified me on February 14, 1980 of the pending motion. I immediately telephoned Steuben and Sullivan counties and was advised by the staff that they are in compliance with the Court Order. On or about February 15, 1980, the Department sent a second mailgram to all districts emphasizing the need to comply with the Court Order and directing the reinstatement of Medicaid benefits to any class-member terminated since November 20, 1979. A copy of this mailgram is attached hereto as Exhibit "B".

WHEREFORE, your deponent respectfully requests that the Court deny plaintiffs' motion to hold defendant Blum in contempt of Court and grant such other relief as may be appropriate.

/s/ RICHARD T. CODY

RICHARD T. CODY

[JURAT OMITTED.]

Mailgram of November 20, 1979

RE: *Stenson et al.* v. *Blum* (USDC:SDNY)

This mailgram will direct your compliance with the decision of Judge Sweet, in the above captioned action. The Court enjoined the termination of Medicaid benefits to all New York State residents who are no longer in receipt of SSI benefits without: (1) An independent determination of Medicaid eligibility; (2) Timely and adequate notice of a termination of Medicaid benefits; and (3) An opportunity for a hearing prior to a termination of Medicaid benefits.

We will shortly issue an Administrative Directive setting forth the procedures involved in performing an independent determination of Medicaid eligibility. Pending release of this Directive, districts shall *not* terminate Medicaid eligibility of any person who would be terminated because of loss of SSI benefits. Direct any questions regarding this Mailgram to John G. Johnson, (518) 474-9182.

/s/ Robert F. Skerrett
Robert F. Skerrett

NYS Department of Social Services
40 North Pearl Street
Albany, New York 12243
(518) 474-9265

RECEIVED
Nov 21 1979
Litigation Bureau
N. Y. State Dept. of
Social Services

Mailgram of February 14, 1980

Dictated by Lou Nestle
Typed by G. VanDyke
February 14, 1980

RE: Stenson et al v. Blum (USDC:SDNY)

On November 20, 1979 we sent you a mailgram requiring you to comply with the Court's injunction in the above entitled action.

We had stated that pending release of an Administrative Directive that districts shall *not* terminate Medicaid eligibility of any person who would otherwise be terminated because of the loss of SSI benefits. Plaintiffs have alleged that some districts have not complied with the provisions of that mailgram. It is imperative that you follow the Court's requirements. Failure to do so may subject you and us to contempt of court.

You must reinstate medical benefits to any person whose SSI benefits were terminated for reasons other than death since November 20, 1979. You must advise such persons that their benefits have been reinstated pursuant to Court Order.

Any questions concerning this mailgram should be directed to Ken Merkelbach at 800-342-3715, extension 4-9141.

Robert F. Skerrett
/s/ Robert F. Skerrett

Acting Deputy Commissioner
NYS Department of Social Services
40 North Pearl Street
Albany, NY 12243

Amendment to Judgment and Order

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

78 Civ. 6044 (RWS)

ELLEN STENSON, individually and on behalf of all other persons similarly situated,

Plaintiff,

vs.

BARBARA BLUM, individually and in her capacity as Commissioner of New York State Department of Social Services, STANLEY BREZENOFF, individually and in his capacity as Commissioner of the New York City Department of Social Services, and JOSEPH CALIFANO, JR., individually and in his capacity as Secretary of Health, Education and Welfare of the United States,

Defendants.

Upon the motion of the State defendant for relief from the final judgment of this court entered on December 20, 1979 and for an amendment to the form of notice approved by this court on January 4, 1980, it is hereby

ORDERED that paragraphs 11 and 12 of the final judgment are amended to read as follows:

11. On or before April 18, 1980, the State defendant shall send a notice to all members of the plaintiff class who were terminated from SSI for a reason other than death,

advising them that, subject to the exception set forth in paragraph 12 of this judgment, their Medicaid benefits will be restored, at their request, effective as of the entry date of this judgment. The notice shall be mailed to the most recent address available to the State defendant. The notice shall further inform class members that no further relief is available from their Federal action, and that retroactive benefits, to the extent that such benefits are available, must be sought through State administrative procedures.

The State defendant shall also publish the substance of the notice in local newspapers at least twice during the week of April 13, 1980.

12. Subject to the exception set forth below, the State defendant shall restore Medicaid benefits, as of the date of this judgment, to all persons who request such restoration in response to the notice sent pursuant to paragraph 11 of this judgment. The State defendant shall not restore Medicaid benefits to those class members who, subsequent to the initial termination from Medicaid, reapplied for and were denied Medicaid benefits, and received a notice advising them of their right to a fair hearing to contest such denial.

The State defendant shall mail Medicaid cards to class members within 30 days after a request for restoration of benefits is received by the State defendant, and shall continue to provide Medicaid benefits until such time as the State defendant:

(a) makes an *ex parte* determination of the continued Medicaid eligibility of that individual;

(b) provides timely and adequate notice of any proposed reduction, termination or suspension of Medicaid benefits;

(c) provides that individual with an evidentiary hearing, if such hearing is timely requested; and

(d) renders a decision after a hearing requested within the period prescribed by 42 C.F.R. section 431.230 and 18 N.Y.C.R.R. section 358.8.

It is further ORDERED that the notice required to be sent by the State defendant in accordance with paragraph 11 of the Final Judgment and the January 4, 1980 order of this court shall be amended to include the following language which shall be placed at the end of the notice:

PLEASE DISREGARD THIS NOTICE IF

1) YOU ARE CURRENTLY RECEIVING MEDICAID, or

2) SUBSEQUENT TO THE TERMINATION OF YOUR SSI BENEFITS YOU REAPPLIED FOR AND WERE DENIED MEDICAID BENEFITS, AND RECEIVED A NOTICE ADVISING YOU OF YOUR RIGHT TO A HEARING TO CONTEST THAT DENIAL.

It is further ORDERED that the requirement that the State defendant enclose a self-addressed envelope with the notice is hereby deleted.

It is further ORDERED that all further relief sought by the State defendant in accordance with the procedure set forth in *Evans* v. *United Lines Company*, 303 F.2d 430 (2d Cir. 1962), including the motion for a stay pending appeal, is denied.

IT IS SO ORDERED:

/s/ ROBERT W. SWEET

Robert W. Sweet
U.S.D.J.

New York, New York
February 20, 1980

Stipulation Withdrawing So Much of Defendant Blum's Appeal as Was Taken from Paragraphs 7, 8, 9, 10 and 14 of the Final Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

[TITLE OMITTED IN PRINTING]

The undersigned attorneys for the respective parties hereby stipulate that:

1. Barbara Blum, the appellant in *Stenson* v. *Blum*, Docket No. 80-7119, hereby withdraws, without costs or attorneys fees and with prejudice, her appeal in that action only insofar as such appeal was taken from paragraphs 7, 8, 9, 10 and 14 of the judgment entered therein.

2. Based upon the above action of appellant Blum, ELLEN STENSON, individually and on behalf of all other persons similarly situated, withdraws, without costs or attorneys fees and with prejudice, her appeal in *Stenson* v. *Harris*, Docket No. 80-6047.

JOHN E. KIRKLIN
Director of Litigation
ARTHUR J. FRIED, of Counsel
The Legal Aid Society
Civil Appeals & Law Reform Unit
11 Park Place—8th Floor
New York, New York 10007

Attorneys for ELLEN STENSON

by /s/ ARTHUR J. FRIED

ARTHUR J. FRIED

ROBERT ABRAMS
Attorney General of the
State of New York
MARION BUCHBINDER, of Counsel
Two World Trade Center
New York, New York 10047

Attorneys for BARBARA BLUM

by /s/ MARION BUCHBINDER

MARION BUCHBINDER

WILLIAM M. TENDY
United States Attorney for the
Southern District of New York
THOMAS WARREN, of Counsel
One St. Andrews Plaza
New York, New York 10007

Attorneys for PATRICIA HARRIS

by /s/ THOMAS WARREN

THOMAS WARREN

SO ORDERED:

March 14, 1980

/s/ A. DANIEL FUSARO
Clerk

Memorandum Endorsement Denying Plaintiff's Contempt Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

78 Civ. 6044 (RWS)

ELLEN STENSON, individually and on behalf of all other persons similarly situated,

Plaintiffs,

vs.

BARBARA BLUM, individually and in her capacity as Commissioner of the New York State Department of Social Services, *et al.*,

Defendants.

SWEET, D.J.

The State defendant represented at the hearing on this motion that appropriate measures would be taken to assure compliance with the judgment of this court. Based upon this representation, the motion to hold the State defendant in contempt is denied at this time with leave to renew in the event of further evidence of non-compliance.

IT IS SO ORDERED:

/s/ ROBERT W. SWEET

ROBERT W. SWEET
U.S.D.J.

Dated: New York, New York
March 28, 1980

U.S.C.A. Order in Plaintiff's Appeal Against City Defendant

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 22nd day of April, one thousand nine hundred and eighty.

Present:

Hon. J. Edward Lumbard
Hon. William H. Mulligan
Hon. Adrian A. Spears*
Circuit Judges

80-7175

ELLEN STENSON, individually and on behalf of all other persons similarly situated,

Plaintiff-Appellant,

against

BARBARA BLUM, individually and in her capacity as Commissioner of the New York State Department of Social Services, and PATRICIA HARRIS, individually and as Secretary of the Department of Health, Education and Welfare,

Defendants,

and

STANLEY BREZENOFF, individually and in his capacity as Commissioner of the New York City Department of Social Services,

Defendant-Appellee.

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* United States District Judge for the Western District of Texas, sitting by designation.

U.S.C.A. Order

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and remanded for consideration of whether the defendant-appellee is liable to the named plaintiff for retroactive benefits in light of the Eleventh Amendment.

/s/ J. Edward Lumbard

J. Edward Lumbard

/s/ William H. Mulligan

William H. Mulligan

/s/ Adrian A. Spears

Adrian A. Spears

Transcript of U.S.C.A. Statement at Disposition of (Defendant Blum's) Appeal in Open Court

(The following statement does not constitute a formal opinion of the court and is not to be reported. It shall not be cited or otherwise used in unrelated cases.)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 80-7119

ELLEN STENSON, individually and on behalf of all other persons similarly situated

Plaintiff-Appellee,

v.

BARBARA BLUM, individually and in her capacity as Commissioner of the New York State Department of Social Services, et al.,

Defendants,

BARBARA BLUM, individually and in her capacity as Commissioner of the New York State Department of Social Services

Defendant-Appellant.

Before:

HON. J. EDWARD LUMBARD, WILLIAM H. MULLIGAN, *Circuit Judges* and ADRIAN A. SPEARS, *District Judge.**

New York, April 16, 1980

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* Hon. Adrian A. Spears, Chief Judge of the Western District of Texas, sitting by designation.

Statement made by the court at disposition of appeal in open court.

JUDGE MULLIGAN

Let me say that we have read the briefs and we are familiar with the propositions of law. We are affirming on the opinion of Judge Sweet which we think is comprehensive and which does comply with the law.

The key differences between this case and the cases which have held that injunctions were issued which went beyond the bounds of *Ex parte Young* is that the class members here are restored to benefits as of the date of judgment. With respect to medical expenses incurred after improper termination but before judgment, class members were simply advised to pursue their State administrative remedies. This is the sort of explanatory notice which Justice Rehnquist characterized as falling on the *Ex parte Young* side of the Eleventh Amndment. *Quern* v. *Jordan*, 440 U.S. 332, 347.

We admit that it is difficult to draw the line between retroactive and prospective relief but in this case we think the line was properly drawn. Moreover, we find no improvident exercise of equity powers because in this case it is clearly the intent of the statute to provide for a continuing Medicaid assistance and that was improperly discontinued by the state and they are eligible as pointed out by counsel until found ineligible.

We, therefore, affirm on the opinion below and we deny, of course, the stay. Thank you.

Plaintiff's (Second) Notice of Motion for an Order Pursuant to Rule 70

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

PLEASE TAKE NOTICE that upon the annexed affirmation of Ann Moynihan, dated May 13[,] 1980, plaintiffs' brief in support of this motion and all prior proceedings and papers herein, the undersigned will move this Court, before the Honorable Robert W. Sweet, in Room 410 at the United States Courthouse, Foley Square, New York, New York on May 23, 1980 at 2:00 o'clock p.m. or as soon thereafter as counsel can be heard for an order, pursuant to Rule 70 of the Federal Rules of Civil Procedure, and Rule 14 of the Civil Rules for the Southern and Eastern District, (1) adjudging defendant Barbara Blum in contempt of this Court's Judgment of December 26, 1979, Order of January 4, 1980, and Amendment to the Final Judgment and Order, dated February 2, 1980;

(2) ordering defendant Blum to immediately send a Medicaid card to each class member who was not receiving Medicaid on December 26, 1980 or who has not had Medicaid coverage for some period between December 26, 1980 and the date the Medicaid card is sent;

(3) ordering defendant Blum to send, along with the Medicaid card, an amended notice (a) advising the class members that they are entitled to Medicaid coverage, effective December 26, 1979; (b) explaining the specific methods by which the class member can obtain payment of outstanding medical bills incurred since December 26, 1979; and (c)

specifying the means by which the class member can obtain reimbursement for medical bills incurred and paid since December 26, 1979;

(4) ordering defendant Blum to pay to each class member entitled to notice of restoration the sum of $10.00 for each day from April 18, 1980 until the Medicaid card is mailed;

(5) ordering defendant Blum to pay to plaintiffs' attorneys the costs and expenses to this motion and a reasonable attorneys' fee;

(6) ordering any other relief this Court deems just.

New York, New York
May 13, 1980

Respectfully submitted,

KALMAN FINKEL
Attorney-in-Charge
The Legal Aid Society
Civil Division

(List of Parties Omitted.)

Affirmation of Ann Moynihan in Support of (Second) Contempt Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

78 Civ. 6044 (RWS)

ELLEN STENSON, etc., *et al.*,

Plaintiffs,

against

BARBARA BLUM, etc., *et al.*,

Defendants.

Ann Moynihan, an attorney admitted to practice law in the State of New York, affirms under penalty of perjury pursuant to Rule 2106 of the New York Civil Practice Law and Rules that:

1. I am an attorney admitted to practice law in the United States District Court for the Southern District of New York. I am of counsel to JOAN MANGONES of The Legal Aid Society, one of the attorneys for plaintiffs herein.

2. I make this affirmation in support of plaintiffs' motion for an order adjudging defendant Blum in contempt of this Court's Final Judgment of December 26, 1980, the Order of January 4, 1980, and the Amendment to Final Judgment and Order of February 2, 1980, which required defendant Blum to notify plaintiff class members of their

right to have Medicaid benefits restored by April 18, 1980 and to publish the substance of the notice in local newspapers during the week of April 13, 1980.

3. Defendant Blum had specific notice of this Court's directive to notify class members of their right to restoration, as evidenced by the fact that she appealed from this very aspect of the relief provided by the Court to the plaintiff class. (Paragraphs 11 and 12 of the Final Judgment, as amended, were affirmed from the bench by the Court of Appeals on April 16, 1980.)

4. On May 7, 1980, I called Marion Buchbinder, Esq., attorney for defendant Blum. I asked Ms. Buchbinder if defendant Blum had sent the required notices to class members and published the substance of the notices in local newspapers. Ms. Buchbinder informed me that defendant Blum had not. Ms. Buchbinder also informed me that the State did not, at this time, intend to provide notice to class members.

5. On May 9, 1980 I received defendant Blum's motion to the Court of Appeals requesting a stay of the restoration provisions of this Court's Judgment pending application to the Supreme Court for a writ of *certiorari*.

Wherefore, plaintiffs seek an order granting the relief specified in the annexed motion.

New York, New York
May 13, 1980.

/s/ Ann Moynihan

Ann Moynihan

Affidavit of Marion Buchbinder in Opposition to Plaintiff's (Second) Contempt Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

State of New York)
County of New York) ss.:

MARION BUCHBINDER, being duly sworn, deposes and says:

1. I am an Assistant Attorney General in the office of ROBERT ABRAMS, Attorney General of the State of New York, attorney for defendant Blum. I make this affidavit in opposition to plaintiff's motion to adjudge defendant Blum in contempt.

2. Subsequent to the entry of this Court's Final Judgment, defendant Blum moved in this Court for a stay of paragraphs 11 and 12 thereof pending appeal, and, when that was denied, submitted said motion to the Court of Appeals.

3. Shortly thereafter, a motions clerk in the Court of Appeals requested that I agree to postpone argument on the motion for a stay until the date of argument (at that time unscheduled) of defendant Blum's appeal. I declined to agree to such postponement, since paragraph 11 of the Final Judgment, as amended, required defendant Blum to send and publish notices during the week of April 13, 1980; and defendant Blum needed sufficient advance notice of

whether the judgment would be stayed to enable her to have the notices printed and mailed by that time of the stay were denied. She would have had sufficient notice if the motions for a stay were signed, as scheduled, on March 25, 1980.

4. A short time later, I was contacted by Allison Manning, secretary to Frank Scardilli, the counsel to the Court of Appeals responsible for scheduling defendant Blum's appeal. Ms. Manning informed me that the argument of defendant Blum's appeal would be scheduled for April 16, 1980, and requested that I consent to postpone argument on the stay until that time. She further advised me that she had spoken to Arthur Fried, counsel for plaintiff, and he had agreed not to move to have defendant Blum held in contempt for a failure to comply with paragraphs 11 and 12 of the Final Judgment resulting from that postponement. Based upon that assurance, I consented to postpone argument on the stay for over three weeks.

5. The stay was denied as academic with the delivery of the Court of Appeals' oral decision on April 16, 1980. When I received authorization from the Solicitor General to file a petition for certiorari, I advised Mr. Fried that I would move for a stay pending disposition of the petition as soon as I received a copy of the transcript of the Court of Appeals' decision, which had been ordered[.] (Unlike written decisions, transcripts of oral decisions are not routinely sent to counsel. They are only prepared, at charge, after a request is made). Mr. Fried stated that he would advise me prior to moving for contempt.

6. Approximately one week later, on May 7, 1980, Ann Moynihan, another counsel for plaintiff, asked me if defendant Blum was going to send and publish the notice

required by paragraph 11 of the Judgment. I informed her that a motion for a stay would be made when I received a transcript of the Court of Appeals' decision, and that defendant Blum would not send and publish the notice pending determination of that motion. Ms. Moynihan then advised me that she was going to move to hold defendant Blum in contempt.

7. A motion for a stay pending certiorari was served and filed on May 9, 1980, although the Court of Appeals had not yet provided the transcript of its decision. The motion for contempt was served four days later.

WHEREFORE, plaintiff's motion to hold defendant Blum in contempt and for the relief stated in the Notice of Motion should be denied.

/s/

MARION BUCHBINDER

Sworn to before me this
21st day of May, 1980

/s/ RICHARD G. LISKOV

Assistant Attorney General
of the State of New York

Reply Affidavit of Arthur J. Fried

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

State of New York)
County of New York) ss.:

ARTHUR J. FRIED, being duly sworn, deposes and says:

1. I am an attorney duly admitted to practice in the United States District Court for the Southern District of New York.

2. I am of counsel to John E. Kirklin of The Legal Aid Society, one of the attorneys for appellant herein.

3. On May 21, 1980 I was served with an affidavit of Marion Buchbinder in opposition to plaintiffs' motion to adjudge defendant Blum in contempt of this Court's judgment, as affirmed by the Court of Appeals.

4. In paragraph 4 of that affidavit Ms. Buchbinder states that she was told by Allison Manning that I had agreed "not to move to have defendant Blum held in contempt for a failure to comply with paragraphs 11 and 12 of the Final Judgment resulting from the postponement" of the argument on defendant Blum's motion for a stay from March 23, 1980 until April 16, 1980. I, of course, have no personal knowledge of what Ms. Manning said to Ms. Buchbinder. I recall quite explicitly, however, my conversation with Ms. Manning. She called and asked me whether plaintiffs would object to the scheduling of argument on defend-

ant Blum's motion for a stay pending determination of the appeal at the same time as the argument on the appeal itself, which would be during the week of April 14, 1980. Ms. Manning told me that this would allow the same panel to rule on both aspects of the case, rather than having two different panels familiarize themselves with the litigation. I stated that I did not object to scheduling the arguments together, as long as this did not result in a further delay in implementation of the judgment, should the stay be denied. I pointed out to her that the week of April 14, 1980 was the week during which notice had to be published in the newspapers and mailed to class members.

5. In response to these comments Ms. Manning informed me of the obvious, that defendant Blum would not be relieved of any of her obligations under the District Court's judgment unless and until the Court of Appeals either reversed or stayed the judgment. At no time did I agree not to move for contempt for any failure to comply with the judgment resulting from the scheduling of the argument.

/s/ Arthur J. Fried

Arthur J. Fried

[Jurat Omitted]

Endorsement Denying Plaintiff's (Second) Motion for Contempt

ENDORSEMENT*

Although the State failed to comply with the judgment of this Court when no stay was in effect, in view of the stay granted on June 11, 1980, the motion for contempt is denied.

So ORDERED
June 16, 1980

/s/ SWEET
U.S.D.J.

* Transcription of handwritten endorsement on back of plaintiff's motion papers.

U.S.C.A. Order Granting Defendant Blum's Motion to Recall U.S.C.A. Mandate and for a Stay of Paragraphs "11" and "12" of the Final Judgment Pending Application for a Writ of Certiorari

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eleventh day of June, one thousand nine hundred and eighty.

80-7119

ELLEN STENSON, individually and on behalf of all other persons similarly situated

Plaintiff-Appellee,

v.

BARBARA BLUM, etc. et al,

Defendants,

BARBARA BLUM, individually and in her capacity as Commissioner of the New York State Department of Social Services

Defendant-Appellant.

It is hereby ordered that the motion made herein by counsel for the appellant Barbara Blum by notice of motion dated May 9, 1980 to recall the mandate of this court and to stay paragraphs "11" and "12" of the final judgment of the District Court pending application to the Supreme Court of the United States and for a writ of certiorari be and it hereby is granted.

/s/ J. EDWARD LUMBARD

J. EDWARD LUMBARD

/s/ WILLIAM H. MULLIGAN

WILLIAM H. MULLIGAN

Circuit Judges

Plaintiff's (Third) Notice of Motion for an Order Pursuant to Rule 70

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

PLEASE TAKE NOTICE that upon the annexed affidavit of Arthur J. Fried, dated December 2, 1980, plaintiffs' brief in support of this motion and all prior proceedings and papers herein, the undersigned will move this Court, before the Honorable Robert W. Sweet, in Room 410 at the United States Courthouse, Foley Square, New York, New York on December 12, 1980 at 2:00 o'clock p.m. or as soon thereafter as counsel can be heard for an order, pursuant to Rule 70 of the Federal Rules of Civil Procedure, (1) adjuding defendant Barbara Blum in contempt of this Court's Final Judgment of December 20, 1979, Order of January 4, 1980 and Amendment to the Final Judgment and Order, dated February 2, 1980; (2) directing said defendant to immediately restore Medicaid benefits to all class members notified pursuant to Paragraph 11 of the Final Judgment herein who have nonetheless been denied restoration by defendant Blum; (3) ordering defendant Blum to pay to each class member denied restoration the sum of $10.00 for each day from the dated [sic] he or she contacted defendant Blum or her agent in response to the notice required by this Court's Judgment until the day that defendant Blum complies with the Judgment and provides the class member with a valid

Medicaid Card; and (4) granting such other and further relief as this Court deems just and proper.

Dated: New York, New York
December 2, 1980

Respectfully submitted,

KALMAN FINKEL
Attorney-in-Charge
The Legal Aid Society
Civil Division

JOAN MANGONES
Attorney-in-Charge
ANN MOYNIHAN, of Counsel
The Legal Aid Society
Staten Island Neighborhood Office

JOHN E. KIRKLIN
Director of Litigation
ARTHUR J. FRIED, of Counsel
The Legal Aid Society
Civil Appeals & Law Reform Unit

[List of parties omitted.]

Affidavit of Arthur J. Fried in Support of (Third) Contempt Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

ELLEN STENSON, etc., et al.,

Plaintiffs,

against

BARBARA BLUM, etc., et al.,

Defendants.

Arthur J. Fried, being duly sworn, deposes and says:

1. I am an attorney admitted to practice law in the United States District Court for the Southern District of New York. I am of counsel to John E. Kirklin of The Legal Aid Society, one of the attorneys for plaintiffs herein.

2. I make this affirmation in support of plaintiffs' motion for an order adjudging defendant Blum in contempt of this Court's judgment of December 20, 1979, Order of January 4, 1980 and Amendment to the Final Judgment and Order, dated February 2, 1980, in the above matter.

3. On December 20, 1980, and February 2, 1980, this Court entered judgment herein requiring Barbara Blum, Commissioner of the New York State Department of Social Services, to:

send a notice to all members of the plaintiff class who were terminated from SSI for a reason other than death, advising them that, subject to the exception set forth in paragraph 12 of this judgment, their Medicaid benefits will be restored at their request, effective as of the entry date of this judgment. The notice shall be mailed to the most recent address available to the State defendant. The notice shall further inform class members that no further relief is available from their Federal action, and that retroactive benefits, to the extent that such benefits are available, must be sought through State administrative procedures;

restore Medicaid and benefits, as of the date of this judgment, to all persons who request such restoration in response to the notice sent pursuant to paragraph 11 of this judgment. The State defendant shall not restore Medicaid benefits to those class members who, subsequent to the initial termination from Medicaid, reapplied for and were denied Medicaid benefits, and received a notice advising them of their right to a fair hearing to contest such denial.

The State defendant shall mail Medicaid cards to class members within 30 days after a request for restoration of benefits is received by the State defendant, and shall continue to provide Medicaid benefits until such time as the State defendant:

(a) makes an *ex parte* determination of the continued Medicaid eligibility of that individual;

(b) provides timely and adequate notice of any proposed reduction, termination or suspension of Medicaid benefits;

(c) provides that individual with an evidentiary hearing, if such hearing is timely requested; and

(d) renders a decision after a hearing requested within the period prescribed by 42 C.F.R. section 431.230 and 18 N.Y.C.R.R. section 358.8.

4. On November 25, 1980, while in Syracuse, New York, I spoke with Ms. Marie Heins, a Staff Attorney at Onondaga Neighborhood Legal Services. Ms. Heins gave me copies of a letter she received from John Zwolak, Director, Medicaid Division, Onondaga County Department of Social Services, dated November 12, 1980 (annexed hereto as Exhibit 1); a letter sent by John Zwolak to Lewis Nestle, Bureau of Litigation, New York State Department of Social Services, dated October 17, 1980 (annexed hereto as Exhibit 2); Nestle's response to Zwolak, dated October 24, 1980 (annexed hereto as Exhibit 3); and a notice purportedly used by the Onondaga County Department of Social Services (annexed hereto as Exhibit 4). Ms. Heins told me that her copies of Exhibits 2, 3 and 4 were enclosed with the November 12 letter she received from John Zwolak.

5. These exhibits establish that defendant Blum has intentionally refused to implement paragraph 12 of this Court's Final Judgment herein as amended.

WHEREFORE, I respectfully request that this Court adjudge defendant Blum in contempt and direct defendant Blum to immediately restore Medicaid benefits to all class members denied restoration and pay to each class member the sum of $10.00 for each day that class member was without Medicaid coverage due to the improper denial of restoration of benefits.

ARTHUR J. FRIED

[Jurat omitted]

Letter of November 12, 1980

[LETTERHEAD OF]

COUNTY OF ONONDAGA
DEPARTMENT OF SOCIAL SERVICES
Civic Center Building
Syracuse, N.Y. 13202
November 12, 1980

JOHN L. LASCARIS
COMMISSIONER

Ms. Maurie Heins
Onondaga Neighborhood Legal Services
633 South Warren Street
Syracuse, New York 13202

Dear Ms. Heins:

I am writing this letter to you, per our telephone conversation of 11/12/80 regarding the retroactive provision of the Stenson court decision.

As I explained in our conversation, our department has received a letter from Lewis S. Nestle, Bureau of Litigation, NYSDSS that we interpret to mean that we have a conditional exemption to the retroactive provision of that Stenson decision. A copy of that letter is attached, along with a copy of the special Discontinuance Notice, used uniquely in Onondaga County.

We have individually reviewed the case of everyone contacting our office to confirm that we had issued the above mentioned special Discontinuance Notice.

Of the 164 persons contacting our agency to date, there has been a copy of this special Notice in all but one case. For

this one case we are in the process of complying with the retroactive provision.

The same is true with the three individuals who had received SSI-MA care in other counties.

Further, for each individual contacting our department, the local exemption to the retroactive provision is explained.

Further, each individual is asked about their interest/need for regular Medicaid. Where they have the interest/need we schedule an application interview to have their eligibility for Medicaid reviewed. To date approximately a dozen individuals have requested this interview and appointments have been scheduled.

Yours truly,

JOHN L. LASCARIS, COMMISSIONER

/s/ JOHN ZWOLAK

JOHN ZWOLAK
Director, Medicaid Division

JZ:lh
Attachment

Letter of October 17, 1980

[LETTERHEAD OF]

COUNTY OF ONONDAGA
DEPARTMENT OF SOCIAL SERVICES
Civic Center Building
Syracuse, N.Y. 13202

October 17, 1980

JOHN L. LASCARIS
COMMISSIONER

Mr. Lewis Nestle
Office of Counsel
New York State Department of Social Services
40 North Pearl Street
Albany, New York 12243

Dear Mr. Nestle:

This letter is to confirm my understanding of our October 17, 1980 telephone conversation regarding compliance with the retroactive portion of the Stenson court decision.

It is my understanding, that for all SSI type MA cases that our agency sent individual notices of discontinuance relating to the discontinuance of the person's eligibility for medicaid based on the SDX tape, that our agency has met it's legal responsibility of due process notification and therefore we are exempt from this retroactive portion of the Stenson court order.

Letter of October 17, 1980

I've attached a copy of the form letter we routinely used to notify our clientele.

I request that you acknowledge this letter and confirm in writing that my understanding of our conversation is correct.

Yours truly,

JOHN L. LASCARIS, COMMISSIONER

/s/ JOHN ZWOLAK

JOHN ZWOLAK
Director, Medicaid Division

JZ/fcd
cc: B. Crumb
Attachment

Letter of October 24, 1980

[LETTERHEAD OF]

NEW YORK STATE
DEPARTMENT OF SOCIAL SERVICES
40 North Pearl Street
Albany, New York 12243
October 24, 1980

BARBARA B. BLUM
Commissioner

John Zwolak, Director
Medicaid Division
Onondaga County Department
of Social Services
Civic Center Building
Syracuse, New York 13202

RE: *Stenson* v. *Blum*

Dear Mr. Zwolak:

This responds to your letter of October 17, 1980 regarding the retroaction portion of the Court judgment.

We have carefully reviewed your letter, the Court judgment and the notice of intent which you attached to your letter. It is the State's position that persons who received the notice of intent as set forth in your letter are not part of the *Stenson* class insofar as reinstatement of benefits are concerned.

Letter of October 24, 1980

However, the county must be able to document that the person seeking reinstatement actually was sent the proper notice. You should be particularly aware that some of the persons seeking reinstatement of benefits may have been terminated by a district which did not use the notice attached to your letter.

Sincerely,

Lewis S. Nestle
Bureau of Litigation

cc: Barbara Crumb

Form Letter

ONONDAGA COUNTY DEPARTMENT OF SOCIAL SERVICES
MEDICAID DIVISION
600 South State Street
Syracuse, New York 13202

NOTICE OF INTENT TO DISCONTINUE
MEDICAL ASSISTANCE AUTHORIZATION

Name of Recipient: | Category and Case Number:

Address: | Date:

This is to advise you that this department intends to DISCONTINUE your medical assistance authorization on _____ (Proposed Date) _____ for the following reason:

We have received notification from the Social Security Administration that you are no longer eligibile for Supplemental Security Income benefits. Since your eligibility for medical assistance is based on your eligibility for Supplemental Security Income benefits, we must discontinue your medical assistance.

If you wish to be evaluated for medical assistance without regard to your eligibility for Supplemental Security Income, you may do so by visiting our office located on the third floor of the County Office Building, 600 South State Street, Syracuse, New York.

You may have a conference at this department to review your case at any time before the proposed date of discontinuance of your medical assistance. Please telephone: _____ at _____ for an appointment.

_____ _____
(Signed) (Date)

Form Letter

RIGHT TO FAIR HEARING

If, within 60 days of the proposed date of discontinuance listed above, you believe that your medical assistance should not be discontinued, you may request a State fair hearing by telephoning 473-8415, or by writing to Fair Hearing Section, New York State Department of Social Services, 40 North Pearl Street, Albany, New York, 12243. If you request a fair hearing, a notice will be sent to you informing you of the time and place of the hearing. At the hearing, you, your attorney or other representative will have an opportunity to present relevant written and oral evidence to demonstrate why your medical assistance should not be discontinued as well as an opportunity to question any persons who appear at the hearing and present evidence against you. If you request a fair hearing before the date your medical assistance is proposed to be discontinued, you will continue to receive your medical assistance unchanged until the fair hearing decision is issued. Community legal services are available to you at Onondaga Neighborhood Legal Services, Inc., 633 South Warren Street, Syracuse, New York, 13202, and Frank H. Hiscock, Legal Aid Society, 433 South Warren Street, Syracuse, New York, 13202.

Stipulation and Order Settling (Third) Contempt Motion and Attorneys' Fees for Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

IT IS STIPULATED AND AGREED by and between the undersigned attorneys for the respective parties that plaintiffs' motion to adjudge defendant BARBARA BLUM in contempt, dated December 2, 1980, is withdrawn according to the following terms and conditions.

1. On or before December 19, 1980, defendant BARBARA BLUM, Commissioner of the New York State Department of Social Services (DSS), will instruct the local social services districts listed in paragraph 4 below, through their Commissioners, that (i) the DSS communications issued on or about October 24, 1980 (a letter containing the substance of these instructions is annexed as Exhibit 1), effectively depriving certain former recipients of Supplemental Security Income (SSI) benefits of the relief accorded by paragraph 11 of the Final Judgment, as amended, have been rescinded; (ii) 80 ADM-84 shall be implemented as it was prior to the modification allowed by the October 24, 1980 communications; and (iii) any individual who received the notice sent pursuant to paragraph 12 of the Final Judgment, as amended, and contacted his or her local social services district but was not restored to medical assistance benefits shall, prior to January 16, 1981, be issued a current Medicaid card and restored to the Medicaid rolls as of December 20, 1979, pending further action of the local social services district in accordance with the Final Judgment, as amended.

Annexed as Exhibit 2 are the instructions to be sent to the Commissioners of the local social services districts to implement the above.

Annexed as Exhibit 3 is the notice to be sent by the Commissioner of the local social services districts to class members provided Medicaid benefits in accordance with the above.

2. Where defendant Blum or the Commissioner of the local social services district does not have the name, address and Social Security number of each class member denied restoration of Medicaid benefits pursuant to the October 24, 1980 communication, the Commissioner of the local social services district shall obtain the missing information by telephone or letter and shall immediately restore Medicaid as above to those class members.

3. If the Commissioner of any local social services district listed below does not have a complete list of those individuals who contacted the Department after receiving a notice mailed pursuant to paragraph 11 of the Final Judgment herein, as amended, and were not restored to Medicaid as a result of the October 24 communication, defendant Blum shall send all class members residing in that County the notice annexed hereto as Exhibit 4, by January 8, 1981. All individuals contacting a local Department of Social Services in response to this notice shall immediately be restored to the Medicaid rolls, effective December 20, 1979, and issued a current Medicaid card.

4. The following social services districts will be instructed in accordance with paragraphs 1-3 above.

Albany	Oneida
Broome	Onondaga
Chautauqua	Ontario
Columbia	Orleans
Essex	Rensselaer
Franklin	Warren
Hamilton	Seneca

Lewis	Steuben
Monroe	Tompkins
Montgomery	Allegany
Nassau	

5. Defendant Blum will obtain from the local social services district and provide to plaintiffs' counsel

(a) the names of all individuals denied restoration to Medicaid pursuant to the October 24, 1980 communications; (b) the names of all individuals restored to Medicaid benefits pursuant to paragraph 1 and 2 of this stipulation, and (c) the number, by County, of class members notified pursuant to paragraph 3 of this stipulation. Counsel for the plaintiffs will preserve the confidentiality of the individuals so restored. Specifically, counsel for the plaintiffs shall not reveal the identity of any of these class members except by further agreement of the parties or order of the Court.

6. The issues of whether class members must be reimbursed by defendant Blum or the Commissioners of the local social services districts for otherwise covered bills incurred by class members that were paid by or on behalf of a class member between December 20, 1979 and his or her restoration to the Medicaid program and how class members will be notified of such reimbursement, if available (it being the position of the defendant Commissioner that paid bills are not reimbursable under the Final Judgment, as amended, herein), are specifically reserved for resolution by the Court or further agreement between the parties.

7. The New York State Department of Social Services shall pay to The Legal Aid Society, attorneys for the plaintiffs, the sum of One Thousand Dollars ($1,000) as attorneys' fees and costs on the motion to adjudge Barbara Blum in contempt, dated December 2, 1980, and no further or

additional recovery of fees and/or costs shall be permitted for that motion.

8. The motion for contempt against Barbara Blum, dated December 2, 1980, may be restored to the calendar of this Court on five (5) days notice to the attorneys for DSS of an alleged breach of any of the conditions set forth above.

Dated: New York, New York
December 17, 1980

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Defendant Blum

By /s/ MARION BUCHBINDER

MARION BUCHBINDER
Assistant Attorney General
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-3023

• • •

/s/ ARTHUR J. FRIED

ARTHUR J. FRIED
Attorneys for Plaintiffs
11 Park Place
New York, New York 10007
Tel. No. (212) 227-2755

SO ORDERED:

/s/ ROBERT SWEET

U.S.D.J.

Dated: New York, New York
January 8, 1981

Plaintiff's Notice of Motion for Attorneys' Fees

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

PLEASE TAKE NOTICE that upon the annexed affidavits of Arthur Fried, dated November 12, 1980, Ann Moynihan, dated November 13, 1980, and Paula Galowitz, dated July —, 1980, plaintiffs' brief in support of this motion and all prior proceedings and papers herein, the undersigned will move this Court, before the Honorable Robert W. Sweet, in Courtroom 36 at the United States Courthouse, Foley Square, New York, New York on December 12, 1980 at 2:00 o'clock p.m. or as soon thereafter as counsel can be heard for an order, pursuant to Rule 54 of the Federal Rules of Civil Procedure and [sic] awarding plaintiffs attorneys' fees in the amount of $128,988 against defendant Barbara Blum, and such other and further relief as this Court deems just and proper.

Dated: New York, New York
November 26, 1980

Yours, etc.

KALMAN FINKEL
Attorney-in-Charge
The Legal Aid Society
Civil Division

Plaintiff's Notice of Motion for Attorneys' Fees

JOHN E. KIRKLIN
Director of Litigation
ARTHUR J. FRIED, of Counsel
The Legal Aid Society
Civil Appeals & Law Reform Unit

JOAN MANGONES
Attorney-in-Charge
ANN MOYNIHAN, of Counsel
Staten Island Neighborhood Office

Attorneys for Plaintiffs-Appellees

to: ROBERT ABRAMS
Attorney General of the
State of New York
MARION BUCHBINDER, of Counsel
Two World Trade Center
New York, New York 10047

HENRY ADLER
Deputy General Counsel
Human Resources Administration
220 Church Street, 6th Floor
New York, New York 10007

Affidavit of Arthur J. Fried in Support of Fee Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

78 Civ. 6044 (R.W.S.)

ELLEN STENSON, etc., *et al.*,

Plaintiffs,

against

BARBARA BLUM, etc., *et al.*,

Defendants.

State of New York)
County of New York) ss.:

ARTHUR J. FRIED, being duly sworn, deposes and says:

1. I am an attorney in the Civil Appeals and Law Reform Unit of The Legal Aid Society of New York City and I am one of the attorneys for the plaintiff class in the above-entitled action. This court having determined that plaintiffs shall recover the costs, expenses and disbursements of this action, together with reasonable attorneys fees, in an amount to be determined by the Court, I submit this affidavit in support of the application of the attorneys for the plaintiff class in this action for an award of a reasonable amount of such fees and costs.

2. Appendix A to this affidavit sets forth in detail the services I performed in the representation of the plaintiff

class in this suit and the amount of time spent on each activity. The services performed by me in this action were of two kinds. I co-ordinated and participated in the making of basic strategic and tactical decisions concerning the direction of the litigation and the settlement negotiations, and I closely supervised, reviewed and edited the preparation of pleadings, briefs and other papers in this suit. I also was primarily responsible for the necessary research and preparation of the proposed judgment submitted on behalf of the plaintiff class, and of the first contempt motion made herein.

3. The figures in Appendix A indicating the amounts of time expended for work done in the suit were transferred from time sheets that I filled out contemporaneously with the services performed.

4. The requested fee rate of $105.00/hr. for work done by me in this case is based upon by background and qualifications, my experience in the development, litigation, and settlement of federal class action suits brought against governmental defendants, and the nature of the services performed by me in this case.

5. I received my J.D. degree in 1975 from Cornell Law School. I graduated law school magna cum laude and was elected to the Order of the Coif. During law school I was an Editor on the Cornell Law Review and published a note entitled "The Outlook for Welfare Litigation in the Federal Courts: *Hagans* v. *Lavine* & *Edelman* v. *Jordan*, 60 Cornell L.Rev. 897 (1975). I was a semi-finalist in the Sutherland Cup Moot Court Competition in which my partner and I received the award for writing the best brief, and I received an American Jurisprudence Award for Trusts and Estates. Finally, I served as a staff member of the Cornell Legal Aid Clinic.

6. After graduating law school, I served as Law Clerk to the Honorable John M. Cannella of the United States District Court for the Southern District of New York for two years. For the past three years I have been an Associate Appellate Attorney in the Civil Appeals and Law Reform Unit of The Legal Aid Society of the City of New York.

7. During my three years with The Legal Aid Society I have actively worked on a large number of class action suits and important appeals asserting both constitutional and statutory rights of indigent clients. I have orally argued in many of these cases before Federal District Courts and the United States Court of Appeals for the Second Circuit. Appendix B to this affidavit summarizes the nature and results of the major suits that I have litigated. As this summary shows I am a specialist in government benefits, concentrating specifically in the areas of Old Age, Survivors and Disability Insurance, Supplemental Security Income and Medicaid benefits.

8. All attorneys' fees awarded by the Court for legal services performed by me in this case will be paid directly to the Civil Division of The Legal Aid Society.

WHEREFORE, I respectfully request that the attorneys' fees awarded to the Legal Aid Society, Civil Division herein include $24,516 for services performed by me on behalf of the plaintiffs in this case.

/s/ ARTHUR J. FRIED

ARTHUR J. FRIED

[JURAT OMITTED.]

Appendix A: Time Records of Arthur J. Fried

Stenson Time Record—1979

Date	[*Hours*]	
3/17	1¼ hrs.	Tactical discussion with Paula Galowitz
4/9	2½ hrs.	Reviewing draft brief on plaintiff's motion for summary judgment
4/10	3 hrs.	Reviewing draft brief on plaintiff's motion for summary judgment
4/11	1 hr.	Reviewing and discussing draft brief with Ann Moynihan
4/11	1½ hrs.	Reviewing plaintiff's 9(g) statement
4/12	3¼ hrs.	Reviewing draft of summary judgment brief
4/22	1 hr.	Discussing defendant's response to summary judgment motion with Ann Moynihan and Paula Galowitz
4/23	2½ hrs.	Reviewing drafts of reply briefs
4/26	2¼ hrs.	Discussing summary judgment argument with Ann Moynihan and Paula Galowitz
4/27	3 hrs.	Summary judgment argument Ann Moynihan, Paula Galowitz and Marshall Green present

Time Records of Arthur J. Fried

Date	[*Hours*]	
5/29	35 mins.	Discussing settlement negotiations with Paula Galowitz and John Kirklin
5/29	1 hr.	Discussing settlement negotiations with Ann Moynihan, Paula Galowitz and Marshall Green
5/31	¾ hr.	Discussing settlement strategy with Ann Moynihan
9/25	1 hr.	Drafting proposed judgment
9/26	¾ hrs.	Drafting proposed judgment
9/26	2¼ hrs.	Drafting proposed judgment Discussing judgment with Paula Galowitz
9/27	7 hrs. 55 mins.	Drafting proposed judgment
9/27	1½ hrs.	Revising draft judgment, discussing draft judgment with Ann Moynihan, Paula Galowitz
9/28	2¼ hrs.	Drafting proposed judgment Discussing proposed judgment with Ann Moynihan
10/11	40 mins.	Reviewing defendant Blum's proposed judgment
10/12	2 hrs.	Reviewing defendant Blum's proposed judgment
10/12	2½ hrs.	Discussing defendant Blum's proposed judgment with Ann Moynihan and Paula Galowitz

Time Records of Arthur J. Fried

Date	[*Hours*]	
10/13	2 hrs. 50 mins.	Drafting response to defendant Blum's proposed judgment
10/14	1 hr. 45 mins.	Reviewing response to defendant Blum's proposed judgment with Ann Moynihan and Paula Galowitz
10/15	50 mins.	Review of response to defendant Blum's proposed judgment
10/24	35 mins.	Drafting letter to Judge Sweet
11/16	1 hr. 25 mins.	Conference before Judge Sweet Ann Moynihan and Paula Galowitz present
11/17	15 mins.	Drafting letter to Judge Sweet
12/4	1¾ hrs.	Reviewing and drafting letter to Judge Sweet
12/17	1¼ hrs.	Drafting letter to Judge Sweet Re: Computer Matches
12/26	3 hrs. 40 mins.	Discussing and analyzing judgment with Ann Moynihan
12/28	2 hrs.	Drafting proposed notice, discussion of proposed notice with Ann Moynihan
Total 1979	**60 hrs. 45 mins.**	

Time Records of Arthur J. Fried

Stenson Time Records 1980

Date	[*Hours*]	
1/23	½ hr.	Preparing time records
2/1	1 hr. 10 mins.	Reviewing and discussing defendant Blum's affidavit on the Rule 60(b) motion with Ann Moynihan
2/1	2 hrs. 35 mins.	Discussing the argument on the 60(b) motion with Paula Galowitz and Ann Moynihan Argument on the Rule 60(b) motion
2/8	2 hrs.	Drafting contempt motion
2/10	6 hrs. 20 mins.	Drafting responsive brief to defendant Blum's Rule 60 motion
2/11	6 hrs. 30 mins.	Drafting responsive brief to defendant Blum's Rule 60 motion
2/13	15 mins.	Telephone conversation with Oliny Clowe regarding compliance with the Stenson judgment
2/22	2½ hrs.	Preparing for argument on the contempt motion, research
2/22	2 hrs. 15 mins.	Discussing strategy on the appeal and on the contempt motion with Ann Moynihan and Paula Galowitz
2/27	1 hr. 15 mins.	Discussing appeal strategy with Ann Moynihan
2/27	2 hrs. 15 mins.	Pre-argument conference Ann Moynihan and Paula Galowitz present

Time Records of Arthur J. Fried

Date	[*Hours*]	
3/2	25 mins.	Preparing appeal forms for the Second Circuit
3/14	2 hrs. 15 mins.	Research on defendant Blum's motion for a stay and appeal
3/24	2 hrs. 40 mins.	Reviewing draft of plaintiff's responsive brief on State's appeal
3/26	6 hrs.	Reviewing and drafting plaintiff's responsive brief on State's appeal
3/27	1 hr.	Discussing plaintiff's responsive brief to State's appeal with John Kirklin and Ann Moynihan
3/27	2 hrs. 5 mins.	Reviewing plaintiff's draft brief in response to the State's appeal
3/28	1 hr. 50 mins.	Reviewing and rewriting draft to [sic] plaintiff's brief in response to the State's appeal.
3/29	2½ hrs.	Confering with Ann Moynihan on plaintiff's response to the State's appeal
4/15	2½ hrs.	Discussing and moot courting the Second Circuit argument on the State's appeal
4/16	1½ hrs.	Second Circuit argument on the State's appeal
5/29	1 hr. 20 mins.	Preparing fee application and affidavit
6/12	3 hrs.	Drafting Response to State's petition for certiorari

Time Records of Arthur J. Fried

Date	[*Hours*]	
6/13	5 hrs.	Drafting Response to State's petition for certiorari
6/16	5 hrs.	Drafting Response to State's petition for certiorari
6/17	3 hrs. 50 min.	Drafting Response to State's petition for certiorari
6/18	3 hrs. 10 min.	Drafting Response to State's petition for certiorari
6/19	55 min.	Drafting Response to State's petition for certiorari
6/23	3 hrs. 20 mins.	Discussing Response to State's petition for certiorari with Ann Moynihan, redrafting, review of time records for fee motion
6/24	2 hrs. 40 min.	Discussing Response to State's petition for certiorari with John Kirklin, Ann Moynihan Final drafting of brief
6/25	2 hrs.	Final redrafting of certiorari brief
6/27	5 hrs.	Final redrafting of certiorari brief
11/21	5 hrs.	Preparing fee Application
Total	———	———
1980	94 hrs. 55 mins.	
1979	60 hrs. 45 mins.	
	155 hrs. 40 mins.	

Appendix B: Major Cases Worked on by Arthur J. Fried

Reichenthal v. *Harris,* (E.D.N.Y.)—Decision rendered requiring the defendant Secretary of Health, Education and Welfare to promulgate rules and regulations establishing the criteria for compliance with 42 U.S.C. §1382g, within 90 days of the decision, and to thereafter promptly determine whether New York State has complied with the statute. Plaintiffs had alleged, on behalf of approximately 56,000 recipients of Supplemental Security Income benefits, that the New York State Department of Social Services had failed to provide the cost-of-living increases in their benefits required by 42 U.S.C. §1382g. —— F.Supp. ——, 79 C. 1632 (E.D.N.Y. May 22, 1980).

Sharpe v. *Harris,* (S.D.N.Y.)—Injunction issued against the Secretary of Health, Education and Welfare requiring that hearings be held and decisions rendered within a reasonable time after a request for a hearing on a Supplemental Security Income claim is made, and that payment of benefits be made within a reasonable time after a favorable hearing decision is rendered. The plaintiff class successfully maintained that the inordinately long delays in these proceedings in New York State violated the Social Security Act, the Administrative Procedure Act, and the Social Security Administration's Claims Manual. Specific time limits for each stage of the process were delineated, and interim payments were directed to be made in those cases that exceeded the time limits. 79 Civ. 1977 (CSH) (August 3, 1979 Memorandum Opinion), (November 14, 1979 Order and Judgment), *aff'd* —– F.2d ——, No. 80-6012 (2d Cir. May 15, 1980).

Gregg v. *Brezenoff,* (S.D.N.Y.)—Injunction issued against the Commissioner of the New York City Department of

Major Cases Worked on by Arthur J. Fried

Social Services requiring the prospective restoration of public assistance benefits, including Home Relief, Aid to Families With Dependent Children, Food Stamps and Medicaid benefits, to individuals summarily suspended without notice, through automatic computer action, within two days of such suspension, and immediate restoration of all households so suspended prior to entry of judgment. The computer suspension mechanism affected approximately 425 public assistance households per month. 79 Civ. 180 (S.D. N.Y. November 26, 1979 Order and Judgment).

Berger v. *Secretary of Health, Education and Welfare,* (E.D.N.Y.)—Consent judgment of nationwide applicability entered into requiring the Social Security Administration to:

a) Continue paying Supplemental Security Income (SSI) benefits to the two named plaintiffs;

b) include within the definition of aliens permanently residing in the United States under color of law aliens residing in the United States pursuant to an order of supervision, indefinite stay of deportation or indefinite voluntary departure and all other aliens residing in the United States with the knowledge and permission of the Immigration and Naturalization Service (INS) whose departure from the United States the INS does not contemplate enforcing;

c) make individualized determinations regarding whether an alien is permanently residing in the U.S. under color of law and if an alien is determined not to be, state in the notice denying benefits that such alien has been found not to be permanently residing in the U.S. under color of law;

d) inform all applicants for or recipients of SSI benefits who, since August 24, 1976, received the defective

notice used since that date that an error may have been made in their case, that they may still be eligible for SSI benefits, and that by going to any Social Security Office within 60 days they can reopen their case and obtain both retroactive and prospective benefits if they are successful.

76 C. 1420 (June 12, 1978 Final Judgment).

Ginsberg v. *Califano,* (E.D.N.Y.)—This challenge to the Social Security Administration's interpretation of 42 U.S.C. §1382(a)(2)(A) was settled when the Administration amended its Claims Manual to conform to plaintiff's view of the statute and agreed to retroactively restore Supplemental Security Income benefits to all individuals adversely affected by the challenged practice. 77 C. 2262 (September 1978).

Zambrana v. *Califano,* (E.D.N.Y.)—This challenge to the delays encountered by Supplemental Security Income and Social Security claimants awaiting renewed administrative proceedings after remand of their claims from federal court was settled on appeal when the defendant Secretary of Health, Education and Welfare agreed to promulgate regulations of nationwide applicability setting time limitations on the processing of these remands. 79 C. 539 (E.D.N.Y.); No. 79-7103 (2d Cir. September 25, 1979 Stipulation).

Affidavit of Ann M. Moynihan in Support of Fee Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

State of New York)
County of New York) ss.:

ANN M. MOYNHAN, being duly sworn, deposes and says:

1. I am an attorney in the Staten Island Neighborhood Office of The Legal Aid Society of New York City, and I am one of the attorneys for the plaintiff class in the above-entitled action. This court having determined that plaintiffs shall recover the costs, expenses and disbursements of this action together with reasonable attorney fees, in an amount to be determined by the Court, I submit this affidavit in support of the application of the attorneys for the plaintiff class in this action for an award of a reasonable amount of such fees and costs.

2. Appendix A to this affidavit sets forth in detail the services I performed in the representation of the plaintiff class in this suit and the amount of time spent on each activity. The services performed by me in this action involved initial representation of the named plaintiff and representation, along with Marshall Green, Esq., of proposed intervenor Michael Murtagh. Both Mrs. Stenson and Mr. Murtagh were clients of the Staten Island Neighborhood office. I was also responsible for the initial research and drafting of the complaint, motions and briefs in this action, with the exception of the initial work on the Judg-

ment, the first contempt motion and brief, the proposed intervention papers of Dorothy Wilson, and the papers prepared on Plaintiff's appeal from so much of the Judgment as dismissed the action against the City defendant. I shared responsibility with Arthur Fried of the Civil Appeals and Law Reform Unit in the preparation of the brief in opposition to the State Defendant's Petition for a Writ of Certiorari as well as the final versions of all pleadings and briefs in this action, with the exceptions given above.

3. The figures in Appendix A indicating the amounts of time expended for work done in the suit were transferred from contemporaneously kept records of work performed or were reconstructed from the file maintained in this case. The major part of the entries reflect actual time records kept and, where time periods were reconstructed, the most conservative estimates were used. A substantial number of hours spent in the preparation of briefs and pleadings in this suit have not been included in the Appendix because specific notations of the dates and times involved were not kept.

4. The requested fee rate of $95.00/hr. for work done by me in this case [is] based on years of experience, my background and qualifications, experience in the development, litigation and settlement of lawsuits brought against governmental defendants, and the nature of the services performed by me in this case.

5. I received my J.D. degree in 1977 from New York University Law School. During law school I was a staff member of the Journal of International Law and Politics, and I worked for one year in the Urban Law Clinic. During law school I placed second in the National Client Counseling Competition and, upon graduation, received the Petluck Memorial Prize for clinical work.

Affidavit of Ann M. Moynihan in Support of Fee Motion

6. Since graduation from law school, I have worked as staff attorney for the Legal Aid Society, with the majority of my cases involving governmental benefits.

7. During my three years with The Legal Aid Society I have actively worked on a large number of individual cases and on class action suits asserting both constitutional and statutory rights of poor people. I have argued cases before Federal and State Courts. Appendix B to this affidavit summarizes the nature and results of some of the suits I have litigated.

8. All attorneys' fees awarded by the Court for legal services performed by me in this case will be paid directly to the Civil Division of the Legal Aid Society.

WHEREFORE, I respectfully request that the attorneys' fees awarded to The Legal Aid Society, Civil Division, herein include $70,085.00 for services performed by me on behalf of the plaintiffs in this case.

/s/ ANN M. MOYNIHAN

ANN M. MOYNIHAN

(Jurat omitted)

Appendix A: Time Records of Ann M. Moynihan

Stenson—Time Report—Ann Moynihan

Date	*Time*	
12/4/78	½ hr.	Initial telephone conversation with Dorothy Granberg complaining of lack of documentation for client's M.A. application
12/4	10 min.	Call to doctor's office re documentation for Medicaid application
12/5	20 min.	Telephone call to local welfare center
12/8	20 min.	Second telephone conversation with Dorothy Granberg
12/8	45 min.	Conversation with Ellen Stenson
12/8	1½ hr.	Trip to welfare center to review file
12/8	20 min.	Telephone call to 34th St. Medicaid
12/8	½ hr.	Telephone call to Social Security office
12/8	15 min.	Telephone call to Medicaid for hearing office
12/8	20 min.	Telephone call to New York State Fair Hearing
12/8	10 min.	Telephone call to New York City Medicaid

Time Records of Ann M. Moynihan

Date	*Time*	
12/8	10 min.	Telephone call to Dr. Rohyeynski re Ms. Stenson's medical condition
12/8	20 min.	Telephone call NYC DSS re emergency assistance
12/9	10 hrs.	Affidavits for Dorothy Granberg and Ellen Stenson prepared. Initial draft of complaint begun.
12/10	8 hrs.	Motion and affidavits for poor person's [relief], order and affidavit to permit services [sic] by other than Marshal, complaint drafting
Subtotal	*23 hrs. and 40 minutes*	
12/11/78	15 mins.	Affidavits proofed and corrected
12/11	1½ [hrs.]	Visit to Ms. Stenson's home to have affidavits signed
12/12	5 hrs.	Research for complaint
12/12	1 hr.	Reviewed complaint with Connie Carden, John Kirklin, Marshal Green
12/13	8 hrs.	Redraft on complaint and legal research
12/14	2 hrs.	Proofed complaint, research
12/14	8 hrs.	Draft of brief
12/15	6 hrs.	Reviewed brief with Connie Carden proofreading

Time Records of Ann M. Moynihan

Date	*Time*	
12/15	20 mins.	Telephone call to attorneys for defendants on temporary restraining order being sought
12/17	4 hrs.	Corrections, proofing, collating papers
12/18	3 hrs.	Summons and Complaint, motion for temporary restraining order, class certification etc., and brief in support filed. Conference on TRO, discussion with defendant City.
12/21	½ hr.	Letter to court with stip.
12/22	1½ hrs.	Service of complaint on state defendant
12/22	4 hrs.	Preparation of interrogatories on state defendant
12/26	3 hrs.	Preparation of interrogatories on state defendant
12/27	2 hrs.	Reviewed interrogatories with Connie Carden
1/ 1/80	½ hr.	Proof state interrogatories[,] corrections
Subtotal	*50 hrs. 35 minutes.*	

Time Records of Ann M. Moynihan

Date	*Time*	
2/ 2/79	½ hr.	Conversation with Michael Murtagh and Marshal Green
2/ 2	20 mins.	Conversation with NYC Medic[aid] re Michael Murtagh
2/13	2½ hrs.	Conference with defendant's re settlement. Marshal Green present
2/20	2 hrs.	Review State defendant's interrog[atories]
2/27	10 mins.	Telephone conversation [with] New York City Medicaid re Murtagh
3/ 1	5 hrs.	Preparation of Proposed Intervenor complaint for Michael Murtagh
3/ 2	3 hrs.	Preparation of Proposed Intervenor complaint for Michael Murtagh
3/ 6	2 hrs.	Review of Fed. def. interrog[atories]
3/14	15 mins.	Prepared Freedom of Information Act letter
3/ 6	4½ hrs.	Research and Brief in support of intervention: Murtagh
3/ 7	4 hrs.	Research and Brief in support of intervention: Murtagh
3/14	10 mins.	Telephone conversation with Paula Galowitz re Dorothy Wilson intervention

Time Records of Ann M. Moynihan

Date	*Time*	
3/14	15 mins.	Preparation of FOIA letter
3/15	4 hrs.	Preparation of brief and intervention papers
3/16	7 hrs.	Preparation of brief and intervention papers
3/17	10 hrs.	Preparation of brief and intervention papers and discussion with Sylvia Wright re Sylvia Alfonso and preparation of Alfonso's affidavit; Preparation of Murtagh affidavit, order to show cause, Moynihan's affidavit in support of intervention
Subtotal	*45 hrs. 40 minutes.*	
3/18	12 hrs.	Research and preparation [of] brief on intervention
3/19	1 hr.	Interview with Murtagh to sign affidavit
3/19	8 hrs.	Preparation of stipulation on TRO, call to opposing attorney re TRO application, preparation of affidavit re telephone call, preparation of affidavit of Moynihan in support of class certification and preliminary injunction.
3/20	3 hrs.	Filed intervention motion, applied for TRO; negotiation with OPA's stipulation signed

Time Records of Ann M. Moynihan

Date	*Time*	
3/26	15 mins.	Preparation of memo to legal services offices re case
3/27	4 hrs.	Review of state defendant's motion for summary judgment
3/28	½ hr.	Discussion with Paula Galowitz
3/29	½ hr.	Review of federal defendant's supplemental answer to interrogatories
3/28	4 hrs.	Review of federal defendant's motion for judgment on the pleadings
3/30	6 hrs.	Research and preparation or [sic] motion for summary judgment and of opposition papers to state and federal motions
3/31	8 hrs.	Research and preparation of motion for summary judgment and of opposition papers to state and federal motions
4/ 1	10 hrs.	Research and preparation of motion for summary judgment and of opposition papers to state and federal motions
4/ 2	8 hrs.	Research and preparation of motion for summary judgment and of opposition papers to state and federal motions
Subtotal	***65 hrs. 15 minutes***	

Time Records of Ann M. Moynihan

Date	*Time*	
4/ 7/79	10 hrs.	Research on brief in support of motion for summary judgment and in opposition to defendant's motion for summary judgment.
4/ 8	8 hrs.	Research on brief in support of motion for summary judgment and in opposition to defendants' motion for summary judgment
4/ 9	12 hrs.	Same
4/10	3 hrs.	Same
4/11	1 hr.	Review draft with A. Fried
4/11	5 hrs.	Research and writing on brief
4/12	8 hrs.	Redraft and proofing on brief
4/13	9 hrs.	Drafting and proofing affidavit in support of summary judgment
4/15	3 hrs.	Amended brief prepared
4/21	8 hrs.	Research and drafting of April 25 reply brief
4/22	1 hr.	Discussion of reply papers to plaintiff's motion for summary judgment
4/23	8 hrs.	Discussion of defendants' responsive pleading and drafting with Paula Galowitz
4/26	2¼ hrs.	Review of State defendant's memo in opposition to plaintiff's motion for summary judgment with P. Galowitz and A. Fried.

Time Records of Ann M. Moynihan

Date	*Time*	
4/27	2 hrs.	Preparation for argument with Paula Galowitz
4/27	3 hrs.	Summary judgment argument.
Subtotal	*83 hrs. 15 minutes*	
5/29/79	1 hr.	Settlement strategy discussion
5/31/79	2 hrs.	Review of case and settlement strategy discussions.
9/20/79	1 hr.	Review and discussion of decision with co-counsel
9/27/79	7 hrs.	Draft judgment
10/12/79	1 hr.	Review of state defendant's proposed judgment
10/12/79	2 hrs.	Review state defendant's proposed judgment with A. Fried and P. Galowitz
10/14/79	1¾ hrs.	Review of response to state defendant's proposed judgment.
11/16/79	1½ hrs.	Preparation for court conference
11/16/79	1 hr. 15 mins.	Conference before Judge Sweet
11/16/79	2 hrs.	Notice of settlement order prepared
12/26/79	3 hrs. 40 mins.	Judgment discussion and analysis with A. Fried
12/28	2 hrs.	Proposed notice to class drafted
Subtotal:	*26 hrs. and 10 minutes*	

Time Records of Ann M. Moynihan

Date	*Time*	
2/ 1/80	6 hrs.	Preparation of affirmation in opposition to state defendant's motion for relief from judgment
2/ 1/80	3 hrs. 45 mins.	Review and discussion of state defendant's 60(b) motion
2/11/80	7 hrs.	Preparation of part of brief in opposition to 60(b) motion
2/22/80	2 hrs. 15 mins.	Discussion on appeal strategy
2/27/80	1 hr. 15 mins.	Discussion [on] appeal strategy
2/27/80	2 hrs. 15 mins.	Pre-argument conference
3/20/80	8 hrs.	Research and preparation of brief on State appeal
3/21/80	10 hrs.	Same
3/22/80	6 hrs.	Same
3/23/80	4 hrs.	Same
3/24/80	10 hrs.	Same
3/25/80	10 hrs.	Same
3/26/80	6 hrs.	Same
3/27/80	11 hrs.	Same
3/28/80	10 hrs.	Same
3/29/80	10 hrs.	Same
3/31/80	8 hrs.	Same
4/15/80	2 hrs. 30 mins.	Moot court and discussion on Second Circuit oral argument on State's appeal
4/16/80	1 hr. 30 mins.	Second Circuit argument on State's appeal
Subtotal	***118 hrs. 15 mins.***	

Time Records of Ann M. Moynihan

Date	*Time*	
5/ 9/80	6 hrs.	Research and preparation for contempt motion
5/12/80	6 hrs.	Draft of memo in support of contempt motion
5/13/80	8 hrs.	Review, redraft and final corrections on memo and motion for contempt against state defendant
6/12/80	6 hrs.	Research on petition for writ of certiorari
6/13/80	5 hrs.	Draft of response to state's petition for cert[.]
6/14/80	6 hrs.	Research on petition for cert.
6/17/80	8 hrs.	Research and drafting on state defendant's petition for cert.
6/18/80	3 hrs.	Same
6/19/80	2 hrs.	Same
6/20/80	5 hrs.	Same
6/23/80	5 hrs.	Discussion, research and drafting on state defendant's petition for cert.
6/24/80	4 hrs.	Same
6/25/80	7 hrs.	Same
6/27/80	8 hrs.	Same
Subtotal	*79 hours*	
Grand Total	491 hours 50 minutes	

Appendix B: Cases Worked on by Ann M. Moynihan

Ramos v. *Blum*, 78 Civ 2575 (USDC, EDNY) Class action challenging failure to provide timely and adequate notice to public assistance recipients being terminated for faliure to fill out questionnaires. Settled by stipulation wherein City and State changed notices being sent to New York City public assistance recipients.

Jordan v. *Bernstein*, Index No. 40413/78, (Supreme Court, New York) Co-counsel in class action challenging failure of New York City to give public assistance applicants predetermination grants. Orders granting relief to individual named plaintiffs signed. Class certification denied.

Haggiag v. *Blum*, S.D.N.Y. Class action brought on behalf of six hundred (600) Staten Island Public Assistance recipients challenging the New York City Department of Social Service's failure to provide timely food stamp authorizations. Orders requiring immediate issuance of food stamps to class members obtained. The issue of damages for named plaintiffs is presently pending before the court.

Rosenberg v. *Blum*, S.D.N.Y. The complaint has been filed in this class action lawsuit challenging the practice of the New York City and New York State Department of Social Services of automatically terminating Medicaid benefits when public assistance benefits are terminated.

Johnson v. *Blum & Bernstein*, App. Div., N.Y. 2d Dept. (co-counsel). Appellate Division reversed decision by the New York City Department of Social Services whereby a public assistance recipient's grant was reduced to recover public assistance benefits misspent by a spouse no longer living with the family. New York Law Journal, October 3, 1979.

Cases worked on by Ann M. Moynihan

Hammill v. *Blum*, App. Div., 2d and 11th Districts, N.Y. Determination by the New York City Department of Social Services and the New York State Department of Social Services reversed where public assistance recipient's grant was reduced to reflect work income actually used to pay for child care expenses based on a fixed schedule adopted by the New York City Department of Social Services. New York Law Journal, Wednesday, April 9, 1980.

Jahn v. *Blum*, N.Y. Supreme Court, Article 78 [proceeding] against the New York City and New York State Department of Social Services challenging the application of a transfer of assets limitation on applications for medicaid by aged, blind or disabled individual. Respondent's [sic] consented to the continued provision of Medicaid benefits to Petitioner.

Affidavit of Paula Galowitz in Support of Fee Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[Title Omitted in Printing]

State of New York)
County of New York) ss.:

PAULA GALOWITZ, being duly sworn, deposes and says:

1. I am an attorney in the Park Place office of the Civil Division of the Legal Aid Society of New York City and I am one of the attorneys for the plaintiff class in the above entitled action. This court having determined that plaintiffs shall recover the costs, expenses and disbursements of this action, together with reasonable attorneys fees, in an amount to be determined by the Court, I submit this affidavit in support of the application of the attorneys for the plaintiff class in this action for an award of such fees and costs.

2. Appendix A to this affidavit sets forth in detail the services I performed in the representation of the plaintiff class and the proposed plaintiff intervenor Dorothy Wilson in this suit and the amount of time spent on each activity. I was initially engaged in the planning and preparations for the motion for intervention and the preliminary court appearance. I continued as co-counsel for the plaintiff class and was responsible with co-counsel for the necessary research and preparation of the pleadings, briefs and other papers in this suit. I also participated in the making of strategy decisions during litigation and prepared for court appearances.

Affidavit of Paula Galowitz in Support of Fee Motion

3. The figures in Appendix A indicating the amounts [sic] of time expended for work done in the suit are derived from entries in my attorney time sheets and case cards and from consultations with my co-counsel.

4. The requested fee rate of $100.00/hr. for work done by me in this case is based upon my background and qualifications, my experience in the development, litigation and settlement of suits, and the nature of the services performed by me in this case.

5. I received my J.D. degree in 1976 from Brooklyn Law School. I graduated law school summa cum laude. During law school, I was a clinical intern at Community Action for Legal Services and a student law clerk to Judge Fuchsberg of the New York State Court of Appeals.

6. Since graduating from law school, I served as a law clerk to Judge Jacob Fuchsberg of the New York State Court of Appeals and as a staff attorney with the Civil Division of The Legal Aid Society of the City of New York.

7. During my three years with The Legal Aid Society, I have had extensive experience in administrative hearings and appeals and state and federal litigation of suits asserting the constitutional and statutory rights of indigent clients. I was counsel in *Roberts* v. *H.E.W.*, E.D.N.Y., 77 Civ. 1795 (EHN), an action which successfully challenged the denial of Social Security benefits. With co-counsel I also brought in federal court a case which challenged certain policies and practices of the New York State Unemployment Insurance Appeal Board in reversing favorable decisions awarding claimants unemployment insurance benefits. *Moore* v. *Ross*, S.D.N.Y., 79 Civ. 1825 (RCL). I was co-counsel in *Willoughby* v. *New York City Housing Authority*, S.D.N.Y., 79 Civ. 2811 (CLB), an action chal-

lenging policies used to deny applicants for government housing benefits. This action resulted in a stipulation of settlement and order favorable to the plaintiff. In *Johnson* v. *Melton*, 100 Misc. 2d 991 (Supreme Court, Kings County 1979), I was co-counsel in an action that successfully challenged procedures that terminated drivers' licenses without adequate notice and an opportunity for a hearing.

8. In addition, I had [sic] had extensive experience as a trial lawyer and have participated in over twenty trials, including jury trials, in the New York State courts. I have been counsel in many Article 78 proceedings involving government benefits and have written many memoranda of law on motions and in appellate practice. In the cases set forth above and in the many other cases I have handled, I have developed research, writing, litigation and negotiation skills which enabled me to serve the interests of the proposed plaintiff intervenor Dorothy Wilson and members of the plaintiff class.

9. All attorneys' fees awarded by the Court for legal services performed by me in this case will be paid directly to the Civil Division of The Legal Aid Society.

Wherefore, I respectfully request that the attorneys' fees awarded to The Legal Aid Society, Civil Division, herein include $34,387 for services performed by me on behalf of the plaintiffs in this class.

/s/ PAULA GALOWITZ

PAULA GALOWITZ

[JURAT OMITTED.]

Time Records of Paula Galowitz

Date	*Hours*	
3/14/79	15 mins.	Discussion with client
	10 min[s].	Tactical discussion with Ann Moynihan
	45 mins.	Telephone calls to Medicaid offices
3/15	4 hrs.	Drafting of Order to Show Cause for a preliminary injunction, for class certification, a temporary restraining order and a Joinder Order and memorandum of law in support of motion
3/15	7 hrs.	Drafting of Order to Show Cause for a preliminary injunction, for class certification, a temporary restraining order and a Joinder Order and memorandum of law in support of motion
3/17	4½ hrs.	Drafting of Order to Show Cause for a preliminary injunction, for class certification, a temporary restraining order and a Joinder Order and memorandum of law in support of motion
	1¼ hrs.	Tactical discussion with Arthur Fried
3/18	8 hrs.	Drafting of Order to Show Cause and brief for intervention
3/19	9 hrs.	Drafting of motion and brief for intervention and proof reading

Time Records of Paula Galowitz

Date	*Hours*	
3/20	1 hr.	Preparation of Stipulation
	2 hrs.	Filed intervention motion, applied for TRO, negotiated with opposing attorneys for interim relief; Stipulation signed
3/27	1½ hrs.	Review of state defendant's motion for summary judgment
3/28	30 mins.	Tactical discussion on telephone with Ann Moynihan
3/29	2 hrs.	Review of federal defendant's motion for judgment on the pleadings
3/30	8 hrs.	Research and preparation of motion for summary judgment and opposition papers to state and federal motions
3/31	8 hrs.	Research and preparation of motion for summary judgment and opposition papers to state and federal motions
4/ 1	6 hrs.	Research and preparation of motion for summary judgment and opposition papers to state and federal motions
4/ 2	5 hrs.	Research and preparation of motion for summary judgment and opposition papers to state and federal motions
4/ 4	4 hrs.	Research and preparation of motion for summary judgment and opposition papers to state and federal motions

Time Records of Paula Galowitz

Date	*Hours*	
4/ 5	3 hrs.	Research and preparation of motion for summary judgment and opposition papers to state and federal motions
4/ 8	8 hrs.	Research and preparation of motion for summary judgment and opposition papers to state and federal motions
4/ 9	2 hrs.	Review of city defendant's motion to dismiss
4/10	4 hrs.	Research and writing of brief for summary judgment
4/11	2 hrs.	Research and writing of brief for summary judgment
4/12	5 hrs.	Redraft and proofreading of motion for summary judgment
4/13	6 hrs.	Redraft and proofreading of motion for summary judgment
4/13	1 hr.	Served and filed motion for summary judgment and memorandum of law
4/21	5 hrs.	Research and drafting of reply brief
4/22	1 hr.	Discussion of defendants' response to motion with Ann Moynihan and Arthur Fried
4/23	4 hrs.	Preparation of reply brief
4/24	5 hrs.	Discussion of defendants' responses with Ann Moynihan and pleading and drafting of reply brief

Time Records of Paula Galowitz

Date	*Hours*	
4/25	4 hrs.	Proof-read reply brief
4/26	2¼ hrs.	Discussion of summary judgment motions with Ann Moynihan and Arthur Fried
4/27	2 hrs.	Preparation for summary judgment argument with Ann Moynihan
4/27	3 hrs.	Court appearance — summary judgment argument
4/27	10 min.	Discussion with client
4/30	5 min.	Discussion with client
5/ 1	5 min.	Called city defendant about client's Medicaid Card
5/ 3	5 min.	Client contact
5/ 7	10 min.	Client contacts
	5 min.	Contacted city defendant about client's Medicaid needs.
5/14	5 min.	Client contact
5/29	35 min.	Strategy discussion with John Kirkland and Arthur Fried
	1 hr.	Settlement discussion with Ann Moynihan, Marshall Green and Arthur Fried
6/ 5	5 min.	Client contact
6/ 5	5 min.	Contact with Judge's law clerk
6/11	5 min.	Client contact
8/ 7	5 min.	Client contact

Time Records of Paula Galowitz

Date	*Hours*	
8/ 9	5 min.	Contacted city defendant about client's Medicaid needs
9/20	1 hr.	Reviewed and discussed Decision with Ann Moynihan
9/26	2¼ hrs	Drafting judgment with Arthur Fried
9/27	1½ hrs.	Revise draft of judgment with Ann Moynihan and Arthur Fried
10/11	1 hr	Reviewed defendant Blum's proposed judgment
10/12	2 hrs	Discussed defendant Blum's proposed judgment with Ann Moynihan and Arthur Fried
10/14	1¾ hrs.	Review of response to defendant Blum's proposed judgment with Ann Moynihan & Arthur Fried
11/ 8	5 min.	Client contact
11/13	5 min.	Client contact
11/14	5 min.	Contacted city defendant about client's Medicaid
11/16	1½ hrs.	Prepared for court conference with Ann Moynihan
11/16	1 hr. 25 min.	Court conference before Judge Sweet
11/16	5 min.	Client contact
2/ 1/80	2 hrs. 35 min.	Discussed the argument on the Rule 60(b) motion with Ann Moynihan and Arthur Fried; court appearance on Rule 60(b) motion

Time Records of Paula Galowitz

Date	*Hours*	
2/ 8	3 hrs.	Research and drafting responsive brief to defendant Blum's Rule 60 motion
2/22	2 hrs. 15 mins.	Discussed strategy on the appeal and on the contempt motion with Ann Moynihan and Arthur Fried
2/27	2 hrs. 15 mins.	Pre-argument conference; Ann Moynihan and Arthur Fried present.
3/ 5	2 hrs.	Research on plaintiff's Second Circuit appeal
3/12	2 hrs.	Research on plaintiff's Second Circuit appeal
3/17	5 hrs.	Preparation of Joint Appendix on plaintiff's appeal
3/18	4 hrs.	Research and drafting brief on plaintiff's appeal
3/20	3 hrs.	Research and drafting brief on plaintiff's appeal
3/21	4 hrs.	Research and drafting brief on plaintiff's appeal
3/22	2½ hrs.	Drafting brief on plaintiff's appeal
3/22	5 hrs.	Working on draft of brief on plaintiff's appeal with Arthur Fried
3/23	3 hrs.	Rewriting draft of brief on plaintiff's appeal
3/24	5 hrs.	Rewriting draft of brief on plaintiff's appeal and proofreading

Time Records of Paula Galowitz

Date	*Hours*	
3/25	1 hr.	Proofreading brief on plaintiff's appeal
4/ 8	1 hr.	Conferring with Arthur Fried on plaintiff's response to city defendant's brief
4/ 8	4 hrs.	Research and drafting of plaintiff's reply brief
4/ 9	5 hrs.	Drafting of plaintiff's reply brief
4/10	4½ hrs.	Redrafting of plaintiff's reply brief
4/11	5 hrs.	Redrafting and proofreading of plaintiff's reply brief
4/14	2 hrs.	Discussion of Second Circuit argument with Ann Moynihan and Arthur Fried
4/15	2 hrs.	Discussion of Second Circuit argument with John Kirklin, Arthur Fried and Ann Moynihan
4/15	4 hrs.	Preparation for Second Circuit argument
4/16	3 hrs.	Second Circuit argument.
5/16	1½ hrs.	Preparing fee application
6/ 5	2½ hrs.	Preparing fee application
7/ 3	1 hr.	Discussion of remand to District Court with Arthur Fried and Ann Moynihan
7/22	1½ hrs.	Preparing fee application and affidavit
Total	**229¼ hours**	

Supplemental Affidavit of Ann Moynihan in Support of Motion for Attorneys' Fees

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

State of New York)
County of Richmond) ss.:

ANN MOYNIHAN, being duly sworn, deposes and says:

1. I am of counsel to JOAN MANGONES, ESQ., THE LEGAL AID SOCIETY, Staten Island Neighborhood Office, attorney for Plaintiff, ELLEN STENSON and one of the attorneys for the Plaintiff Class in the above entitled action.

2. I make this supplemental affidavit in support of Plaintiffs' Motion for attorneys' fees.

3. Plaintiffs' wish to modify their Motion to set the amount of Attorney's fees by deleting the hours spent by Paula Galowitz, Esq., on legal work done on the Appeal of this Court's decision dismissing the action against the City Defendant. Those hours were inadvertently included in the Motion for Attorney's Fees against the State Defendant, and Plaintiffs agree they should not be billed against the State Defendant. Plaintiffs further wish to modify their request for fees by deleting four hours spent by Ann Moynihan, Esq. on proofreading and compiling the summons and complaint and Motion for a Temporary Restraining Order in this action.

Supplemental Affidavit of Ann Moynihan

4. Specifically, Plaintiffs withdraw the request for reimbursement for Paula Galowitz's hours from March 5, 1980 through April 16, 1980. The total hours withdrawn are 63 hours. Thus the requested award should be reduced by $9,450.00 to reflect those hours spent by Ms. Galowitz on the appeal against the City defendant. No hours spent by the other attorneys in the case on the appeal against the City defendant were included in the Motion.

5. The State defendant in her memorandum of law refers to time spent proofreading as a non-reimbursable attorney's fee. In my original affidavit, I include a number of entries referring to "proofreading". By proofreading, I meant reading the final copy of the brief with an eye toward any necessary modification of the substance of the writing, not to proofreading for typographical accuracy. Support staff, and, in some instances law students, performed that function. Those instances where I proofread for typographical accuracy only were not included in the hours specified, with one exception: the work performed on December 17, 1978.

6. As to the four hours spent proofreading on December 17, 1978, Plaintiffs request that the Court disregard them in computing the attorneys fees awarded, reducing the amount sought by Plaintiffs by $570.00.

7. As stated in the original affidavits in support of this motion, the time spent on this case has been conservatively recorded and estimated. In addition, Plaintiffs have not requested reimbursement for the research time spent by law students on this case. Nor have Plaintiffs requested reimbursement for the costs incurred in litigating the action. Counsel for Plaintiffs, where necessary, served

papers in this action, but those activities have not been included in the time expended. Nor has the State defendant been charged for time spent on some of the early settlement discussions that took place, nor for a number of visits I made to Mrs. Stenson's home and a number of telephone calls in connection with representation of Mrs. Stenson in this action. Furthermore, none of the time spent in preparing my time records has been included in the fee request.

8. Finally, as to the state defendant's claim that research or writing involved duplicative work, Mr. Fried, Ms. Galowitz and I, throughout the course of the litigation, divided responsibility for various discrete issues or tasks connected with the litigation.

WHEREFORE, it is respectfully requested that Plaintiffs be awarded attorneys' fees in the modified amount of $118,968.00.

/s/ ANN MOYNIHAN

ANN MOYNIHAN

[JURAT OMITTED.]

Supplemental Affidavit of Arthur J. Fried in Support of Motion for Attorneys' Fees

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

State of New York)
County of New York) ss.:

ARTHUR J. FRIED, being duly sworn, deposes and says:

1. I am of counsel to John E. Kirklin, THE LEGAL AID SOCIETY, one of the attorneys for the Plaintiff Class in the above entitled action.

2. I make this supplemental affidavit in support of Plaintiffs' motion for attorneys' fees.

3. The three attorneys who have submitted fee applications in this case, Paula Galowitz, Ann Moynihan, and myself, were the attorneys assigned by The Legal Aid Society to handle the litigation of this action. (Other attorneys, for whom compensation is not sought, performed supervisory functions.) All tasks arising during the course of the litigation were performed in the following manner: All three attorneys would meet or talk over the telephone to discuss strategy. One attorney assumed responsibility for research, analysis and drafting. A second attorney then reviewed the written draft and either the reviewer or the original drafter would make revisions. On a few occaissions [sic], where extremely difficult sections of the briefs were concerned, both other attorneys reviewed the

initial drafts. On the other hand, many letters and some sections of the briefs were drafted and submitted without review by a second attorney, where this was not thought necessary. Thus, throughout the course of the litigation, responsibility for all tasks connected with the litigation was divided, ensuring that no duplication of effort or time took place.

WHEREFORE, it is respectfully requested that plaintiffs be awarded attorneys' fees in the amount of $118,986.

/s/ ARTHUR J. FRIED

ARTHUR J. FRIED

[JURAT OMITTED.]

Supplemental Affidavit of Paula Galowitz in Support of Motion for Attorneys' Fees

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

State of New York)
County of New York) ss.:

PAULA GALOWITZ, being duly sworn, deposes and says:

1. As a Staff Attorney in the Park Place Office of the Legal Aid Society, I was one of the attorneys for the Plaintiff class herein.

2. I am presently on sabbatical and teaching at the New York University Law School.

3. I make this supplemental affidavit in support of Plaintiffs' Motion for attorneys' fees.

4. The hours claimed in my affidavit in support of Plaintiffs' Motion for an award of attorneys' fees for legal work done between March 5, 1980 through April 16, 1980 were for work performed in connection with the Plaintiffs' appeal of the dismissal of the City Defendant. I did not intend to include these hours in a Motion for Attorneys' Fees against the State defendant, and request that these hours be disregarded by the Court.

5. I understand that the State defendant has objected to certain hours contained in my original affidavit for work

done on proofreading the various appeals and motions in this action.

6. I wish to clarify to the Court that the proofreading referred to in the appendix to my affidavit was not for a "technical" proofreading, but rather was a reading of the brief to evaluate its clarity and to make substantive changes.

WHEREFORE, I request that the Court modify the attorneys' fees request by Plaintiffs to remove those [hours] spent by me in connection with the appeal against the dismissal of the City Defendant and to award fees for all other hours requested in the initial affidavit.

/s/ PAULA GALOWITZ

PAULA GALOWITZ

[JURAT OMITTED]

Opinion of the District Court on Attorneys' Fees

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

78 Civ. 6044 (RWS)

ELLEN STENSON, Individually and on behalf of all other persons similarly situated,

Plaintiff,

against

BARBARA BLUM, Individually and in her capacity as Commissioner of the New York State Department of Social Services; STANLEY BREZENOFF, individually and in his capacity as Commissioner of the New York City Department of Social Services; and PATRICIA HARRIS, individually and in capacity as Secretary of Health, Education and Welfare of the United States,

Defendants.

APPEARANCES:

The Legal Aid Society Civil Division
Civil Appeals & Law Reform Unit
Attorneys for Plaintiffs
11 Park Row—8th Floor
New York, New York 10007
By: KALMAN FINKEL, ESQ.
Attorney-in-Charge
Civil Division

JOHN E. KIRKLIN, ESQ.
Director of Litigation
ARTHUR J. FRIED, ESQ., *Of Counsel*
Civil Appeals & Law Reform Unit
JOAN MANGONIS, ESQ.
Attorney-in-Charge
ANN MOYNIHAN, ESQ., *Of Counsel*
Staten Island Neighborhood Office

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Defendants
Two World Trade Center
New York, New York 10047
By: MARION BUCHBINDER, ESQ.
Of Counsel

Sweet, D.J.

In this, the final installment in this difficult litigation, attorneys for the plaintiff class seek an award of $118,968 as payment for their services in connection with their conduct of this action. The motion is granted.

The factual background of, and legal issues raised by this civil rights action are largely set forth in a prior opinion of this court, *Stenson* v. *Blum*, 476 F. Supp. 1331 (S.D. N.Y. 1979), *aff'd*, 628 F.2d 1345, *cert. denied*, 101 S.Ct. 239 (1980), and will not be detailed here. Briefly, the case involved a challenge to termination procedures utilized for certain recipients of Medicaid. The plaintiff class prevailed in its claims against the State defendants, and secured class-wide relief guaranteeing certain due process rights to Medicaid recipients. The legal issues involved were both novel and complex, involving a complicated interaction between state and federal law and a contract between

the state and federal governments. By prior opinion, *id.*, the named plaintiff prevailed in her motion for class certification and in her prayer for injunctive relief against the State of New York. In addition, I awarded plaintiff reasonable attorney's fees, pursuant to 42 U.S.C. § 1988. *Id.* at 1343. The instant motion seeks to establish the amount of the fees to which attorneys for the plaintiff class are entitled.

Throughout this litigation, the plaintiff class was represented by The Legal Aid Society ("Legal Aid"), through its staff attorneys Arthur J. Fried ("Fried"), Ann Moynihan ("Moynihan"), and Paula Galowitz ("Galowitz"). Fried is a 1975 graduate of Cornell Law School with extensive experience in litigation involving government benefits. He has been an attorney with Legal Aid for over three years. Before then, he was a law clerk in this district for two years. Moynihan is a 1977 graduate of New York University Law School, who has also worked as a Legal Aid attorney for well over three years. Galowitz received her J.D. degree from Brooklyn Law School in 1976. She, too, has been with Legal Aid for more than three years. Like Fried, Moynihan and Galowitz have considerable experience in litigation involving government benefits and the legal rights of the indigent.

Fried, Moynihan and Galowitz request for $118,968 in fees is based on a detailed recitation of the hours each expended on this litigation and the tasks they performed. They have submitted a summary breakdown of the fees sought, as follows:

Attorney	*Hours*	*Rate*	*Lodestar*	*Incentive Award*	*Total*
Ann Moynihan	487 hrs. 50 min.	$95/hr.	$46,343	$23,172	$69,515
Paula Galowitz	166 hrs. 15 min.	$100/hr.	16,625	8,312	24,937
Arthur Fried	115 hrs. 40 min.	$105/hr.	16,344	8,172	24,516
					118,968

The Defendant does not contest plaintff's entitlement to fees. However, she does object to the specific fee request made, claiming, first, that the rates sought are exorbitant, second, that plaintiff's counsel failed to differentiate between time spent on issues involving the state defendant and those involving the federal and city defendants, third, that the claim unjustifiably asks reimbursement for time spent on issues on which plaintiff did not prevail, fourth, that the hours spent were excessive, fifth, that plaintiff's request is inflated by duplication of attorneys' labor, and, finally, that plaintiff should not be awarded a bonus.

This Circuit utilizes a two-step process in the calculation of attorney's fees. First, the number of hours expended by each attorney involved in the case is multiplied by the hourly rate normally charged for similar work by attorneys of like skill in the area, to obtain a "lodestar" figure. Second, the lodestar figure may be adjusted upward or downward to reflect factors such as the risk and complexity of the litigation and the quality of the representation. *See Cohen* v. *West Haven Board of Police Commissioners,* No. 80-7233 (2d Cir. Dec. 23, 1980); *City of Detroit* v. *Grinell Corp.,* 495 F.2d 448, 470-71 (2d Cir. 1974). This process is applied to the calculation of attorneys' fees in actions under the civil rights statutes just as it is applied to other types of actions, *see Cohen, supra,* slip opinion at 718, n.15; *Mid-Hudson Legal Services, Inc.* v. *G & U, Inc.,* 578 F.2d 34 (2d Cir. 1978), and to awards to legal services associations just as to awards to private counsel, *id.; Torres* v. *Sachs,* 538 F.2d 10 (2d Cir. 1976); *Becker* v. *Blum,* 487 F. Supp. 873 (S.D.N.Y. 1980). Before applying this formula to the fee application before me, I will address defendants' objections to it.

Defendant[']s first objection is that the rates sought are exorbitant. I disagree. The rate used in calculation of the lodestar amount depends, as stated above, on two fac-

tors: the rate charged for (1) similar work by (2) attorneys of like skill in the area. The rates requested here are consonant with fee awards in cases of similar complexity and difficulty. *See, e.g., Population Services International* v. *Carey*, 476 F. Supp. 4 (S.D.N.Y. 1979) (in action challenging, state statute governing distribution of contraceptives on constitutional grounds, fees ranging from $60 per hour for associates to $120 per hour for partners found reasonable); *City of New York* v. *Darling-Delaware*, 440 F. Supp. 1132 (S.D.N.Y. 1977) (in antitrust case, hourly rates of $150-$175 termed reasonable). Furthermore, they are fair in view of these attorneys experience and expertise, *see Becker* v. *Blum, supra,* (fees of $75 for attorneys with fewer than two years experience since bar admission and $90 for those admitted more than two years termed an "understatement.") The quality of work performed by counsel throughout this case was high. In view of all of these considerations, I do not find the requested rates, from $95 per hour to $105 per hour, excessive. Nor do I deem it necessary to vary the hourly rate awarded with the nature of the service performed, as defendant would have me do. *See Cohen* v. *West Haven Board of Police Commissioners, supra,* (decision whether to vary rate within trial court's discretion); *Blank* v. *Talley*, 390 F. Supp. 1 (S.D.N.Y. 1975) (average rates applied to all types of services).

Defendant's second objection, to counsel's failure to differentiate time spent on issues involving the three defendants, is also without merit. Although plaintiff's fee request initially encompassed time spent on issues involving only the city defendants, it has been modified to exclude hours spent on those issues. Insofar as the request fails to differentiate between time spent on issues involving the federal and state defendants, I find that failure no bar to full compensation here. The legal issues involving the

federal and state defendants were intermingled in such a fashion in this case that such differentiation would not be possible, and, indeed, would not accurately reflect time spent on issues of importance to the claims against the state. The federal issues were bound up with the state claims in such a way that it is fair to base an award against the state on hours devoted to both. *See generally Stenson v. Blum, supra.*

Defendants' third objection is that plaintiffs' ask reimbursement for time spent on issues on which plaintiff did not prevail. Defendants cite, in particular, time spent on contempt motions which were not granted and intervenor motions which were denied. This objection, too, is without merit, for several reasons. First, although the intervenor motions were denied, they were denied because plaintiff succeeded on a motion for certification of a class in which the proposed intervenors were included, thus rendering intervention unnecessary. *See id.* Although in a technical sense plaintiff may be said not to have prevailed on those motions, in practical terms they were successful in achieving the desired result. Second, the first of the two contempt motions, brought to secure compliance with this court's decree, was denied only after compliance was already achieved. That success was due in part to the filing of the contempt motion itself. Again, to term this result a failure to "prevail" would be to ignore reality. The second contempt motion also sought to secure compliance with this court's decree and was denied not because it was without merit, but because the defendant had moved for a stay pending a determination of her petition for a writ of *certiorari*. To deny attorneys' fees for the filing of this motion, which cannot be said to have been unjustifiably brought, would not comport with the statutory goal of encouraging civil rights actions. Fee awards are appropriate for time spent on efforts to secure compliance with court decrees, no less

than for time spent securing those decrees. *See Northcross* v. *Board of Education of Memphis City Schools*, 611 F.2d 624, 637 (6th Cir.) *cert. denied*, 477 U.S. 911 (1980); *Miller* v. *Carson*, 628 F.2d 346, 348 (5th Cir. 1980) (fees granted for post-judgment motions, including motion for contempt, which "although never ripening into courtroom activity," had effect of securing compliance with injunction.)

Moveover, I would deem it appropriate to grant fees for the time spent on issues on which the plaintiff did not formally prevail even if the considerations just discussed were not present. The requirement that the party requesting fees have "prevailed" has been interpreted to mean prevail on the case as a whole. *See Northcross, supra.* In *Northcross* the circuit court rejected the approach of the court below, which had declined to award fees for those issues on which plaintiff had not prevailed, saying that once it is determined that plaintiffs prevailed on the action as a whole, they are entitled to attorneys' fees for all time reasonably spent on the matter. That approach supports the award of fees for time spent on the contempt and intervenor motions here, even if those motions are deemed unsuccessful. *See also Seigal* v. *Merrick*, 619 F.2d 160, 164-65 (2d Cir. 1980); *Brown* v. *Bathke*, 588 F.2d 634 (8th Cir. 1978). *Cf. Gagne* v. *Maher*, 594 F.2d 336, *aff'd.*, 100 S.Ct. 2570 (1980) (fee award under § 1988 appropriate even though constitutional issue not reached). *But see Nadeau* v. *Holgemoe*, 581 F.2d 275 (1st Cir. 1978) (fees awarded only for hours spent on issues on which plaintiff prevailed).

The fourth objection raised is that the hours spent were excessive. Again, I disagree. As stated above, the issues presented were complex, and the proceedings fully warranted the hours devoted to them.

I also reject defendants' contention that the attorneys' efforts were duplicative. I am satisfied by the affidavits submitted by plaintiffs' counsel that the work performed

outside of the courtroom was divided in such a way as to avoid duplication. Furthermore, I reject defendants' contention that plaintiffs' attorneys unjustifiably appeared as a team in court and at conferences. This Circuit recently expressed its reluctance to deprive counsel of assistance during such conferences and court appearances. *See Siegal* v. *Merrick, supra. See also Willoughby* v. *New York City Housing Authority*, 79 Civ. 2811 (CLB) (Dec. 4, 1980). This court, like the court in *Willoughby*, respects counsel's decision regarding staffing of appearances, and will not reject that portion of the fee application which reflects those appearances.

Finally, defendants contest plaintiffs' application for a bonus, or incentive award, above the lodestar amount. The main ground of the objection is that the award will be paid from the public fisc. However, the law in this Circuit is clear that attorneys' fees are to be calculated in the same manner regardless of whether the defendant is a private or a public entity. *See Torres* v. *Sachs, supra; Population Services International* v. *Carey, supra*, at 9 n.5. Therefore, if a bonus is otherwise appropriate here, it should not be withheld because the award is to be paid from public funds.

I now turn to the calculation of fees. I have already decided that both the rate of payment requested and the hours expended by plaintiffs' counsel are reasonable. Therefore, the lodestar figure is that which they propose: $79,312.

On the facts of this case, I deem an upward adjustment of the lodestar amount appropriate. The quality of representation was high. The litigation was complex. The issues presented were novel, and the undertaking therefore risky. Finally, the outcome was of great benefit to a large class of needy people. All of these factors render an incentive award appropriate. *See Cohen* v. *West Haven Board of Police Commissioners, supra* (factors include risk, complexity, and quality of representation); *Population Serv-*

ices International v. *Carey, supra* (social benefits of the action a factor in upward adjustment of lodestar amount); *Beazer* v. *New York City Transit Authority*, 558 F.2d 97 (2d Cir. 1977) (complexity or risk of loss on the legal issues and benefit to the clients important factors in bonus award).

Plaintiffs request a bonus of 50% of the lodestar amount. Particularly in view of the complexity of the litigation and the benefit to the class, I find such an award appropriate. *See Population Services International* v. *Carey, supra* (50% bonus awarded); *City of New York* v. *Darling Delaware, supra* (bonus awards of 60% to 200% granted); *Blank* v. *Talley, supra* (50% bonus awarded).

Plaintiff is entitled to an award equal to the lodestar figure plus the bonus award, for a total of $118,968.

Submit judgment on notice within ten (10) days.

IT IS SO ORDERED.

DATED: New York, N.Y.
March 26, 1981

/s/ ROBERT W. SWEET

ROBERT W. SWEET
U.S.D.J.

Order and Judgment Awarding Attorneys' Fees

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

78 Civ. 6044 (RWS)

ELLEN STENSON, individually and on behalf of all other persons similarly situated,

Plaintiffs,

against

BARBARA BLUM, individually and in her capacity as Commissioner of the New York State Department of Social Services, STANLEY BREZENOFF, individually and in his capacity as Commissioner of the New York City Department of Social Services, and PATRICIA HARRIS, individually and in her capacity as Secretary of Health, Education and Welfare of the United States,

Defendants.

This case having come before the Court on Ellen Stenson's motion to set the amount of attorneys' fees, and an opinion having been rendered on March 26, 1981 granting that motion, it is hereby

ORDERED, ADJUDGED and DECREED that defendant Barbara Blum, as Commissioner of the New York State Department of Social Services, pay to The Legal Aid Society of New York, counsel to plaintiffs herein, attorneys' fees in the amount of $118,968.00, plus interest pursuant to 28 U.S.C. §1961.

/s/ ROBERT W. SWEET

ROBERT W. SWEET, U.S.D.J.

Dated: New York, New York
April 10, 1981

JUDGMENT ENTERED
Clerk

Notice of Appeal

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

PLEASE TAKE NOTICE that defendant Blum hereby appeals to the United States Court of Appeals for the Second Circuit from the Order and Judgment of this Court dated April 10, 1981, entered April 13, 1981, ordering defendant Blum, as Commissioner of the New York State Department of Social Services, to pay to the Legal Aid Society attorneys' fees in the amount of $118,968.00, plus interest pursuant to [28] U.S.C. §1961. Defendant Blum appeals from each and every part of the Order and Judgment.

Dated: New York, New York
May 8, 1981.

Yours, etc.,
ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Defendant Blum

By /s/ MARION R. BUCHBINDER

MARION R. BUCHBINDER
Assistant Attorney General
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To:

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Henry Adler, Esq.
N.Y.C. Human Resources Administration
220 Church Street
New York, New York 10013

Order of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit at the United States Courthouse in the City of New York, on the 19th day of October, one thousand nine hundred and eighty-one.

Present:

HONORABLE IRVING R. KAUFMAN,
HONORABLE JAMES L. OAKES,
HONORABLE AMALYA L. KEARSE,
Circuit Judges

81-7385

ELLEN STENSON, individually and on behalf of all other persons similarly situated,

Plaintiff-Appellee.

v.

BARBARA BLUM, individually and in her capacity as Commissioner of the New York State Department of Social Services, BLANCHE [BERNSTEIN], individually and in her capacity as Commissioner of the New York City Department of Social Services and JOSEPH CALIFANO, individually and as Secretary of Health, Education and Welfare of the United States,

Defendants,

BARBARA BLUM, individually and in her capacity as Commissioner of the New York State Department of Social Services,

Defendant-Appellant.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Order of the United States Court of Appeals
For the Second Circuit

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

1. Appellant's claim that the award of attorney's fees in the amount of $118,968 pursuant to 42 U.S.C. § 1988 is based on duplicative and otherwise excessive hours and unreasonably high hourly rates is without merit. Having reviewed time records identifying the projects for which compensation was requested and the time spent by the three attorneys on each project, Judge Sweet acted well within his discretion in concluding that the 769¾ hours for which the attorneys requested compensation did not represent duplicative or unnecessary efforts. *Siegal* v. *Merrick*, 619 F.2d 160 (2d Cir. 1980).

2. In granting compensation at rates of $105.00 for Mr. Fried, $100.00 for Ms. Galowitz, and $95.00 for Ms. Moynihan, Judge Sweet approved compensation at hourly rates comparable to the rates "normally charged for similar work by attorneys of like skill in the area," *Cohen* v. *West Haven Board of Police Commissioners*, 638 F.2d 496, 505 (2d Cir. 1980), and those rates frequently granted in civil rights and other equally complex cases, *see, e.g.*, *Neely* v. *City of Grenada*, 624 F.2d 547, 551 (5th Cir. 1980); *City of Detroit* v. *Grinnell Corporation*, 560 F.2d 1093 (2d Cir. 1977).

Order of the United States Court of Appeals For the Second Circuit

3. Since the procedural and substantive issues in this case were extremely complicated, the quality of representation high, the outcome of great benefit to a large class of [needy] people, and the ultimate resolution uncertain, Judge Sweet acted within his discretion in making an upward adjustment of fifty percent in the figure determined by multiplying the number of hours worked by the rate of compensation. *See Cohen* v. *West Haven Board of Police Commissioners, supra,* 638 F.2d at 505 (court may make upward or downward adjustments to take account of such subjective factors as the risk and complexity of the litigation and the quality of the representation).

/s/ IRVING R. KAUFMAN
Irving R. Kaufman

/s/ JAMES L. OAKES
James L. Oakes

/s/ AMALYA L. KEARSE
Amalya L. Kearse
Circuit Judges

Opposition

ORIGINAL

Office-Supreme Court, U.S.
FILED
MAR 1 1982
ALEXANDER L. STEVAS,
CLERK

No. 81- 1374

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

BARBARA BLUM, individually and in her capacity as Commissioner of the New York State Department of Social Services,

Petitioner,

against

ELLEN STENSON, individually and on behalf of all other persons similarly situated,

Respondent.

REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

KALMAN FINKEL
Attorney-in-Charge
THE LEGAL AID SOCIETY
Civil Division

JOHN E. KIRKLIN
Director of Litigation
ANN MOYNIHAN, of Counsel
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Attorneys for Petitioner

QUESTIONS PRESENTED

1. Whether the Court of Appeals was correct in affirming an award of fees to a legal services organization; the award having been computed on the basis of the market value standard approved by Congress when enacting Section 1988?

2. Whether 42 U.S.C. §1988 forbids the upward adjustment of typical hourly attorney fee rates to reflect the contingent nature of a case, the complexity of the issues involved, the quality of the representation, and the breadth of the public benefit obtained; and whether, if such upward modification is permitted, the Court of Appeals for the Second Circuit correctly held that the District Court in the instant case acted well within the range of its discretion in approving an upward adjustment of 50 percent in the hourly rate awarded because extremely complex procedural and substantive issues were involved, the quality of the representation was high, the litigation was of uncertain outcome and the judgment benefitted a large class of needy people?

3. Whether the Court of Appeals was correct in holding that the District Court acted well within its discretion in concluding that the hours claimed were not duplicative?

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REASONS FOR DENYING THE WRIT

The Writ of Certiorari sought in this case should be denied since the Petitioner essentially takes issue only with the application of principles plainly made applicable by Congress for determining attorney fee awards under 42 U.S.C. §1988 and with matters committed to the sound discretion of the District Court.

Stripped of rhetoric, the petition seeks judicial amendment of the legislatively-prescribed standards governing statutory fee awards under Section 1988 to public interest or legal services organizations that do not bill clients for their services. Petitioner would achieve a reduction of these fees by replacing the market rate standard intended by Congress -- which is based upon fees paid to attorneys of similar skill handling cases of similar complexity --with a cost-based standard that has been rejected by all the Circuit Courts that have considered it. Petitioner would further limit the award of fees granted under Section 1988 by eliminating from the calculation of the hourly fee any upward adjustment or "bonus" based on the consideration of a number of factors specified by Congress as being appropriately included in the computation.

Petitioner's arguments urging the adoption of such restrictive standards that single out fee awards to legal services or public interest organizations for special treatment fly directly in the face of the clearly enunciated Congressional intention that the award of fees in such cases is to be governed by the same standards as are applied to the fee awards of private attorneys. See H.R. Rep. No. 94-1558, p. 8, n. 16, citing with approval the awards of fees to public interest

attorneys in Torres v. Sachs, 69 F.R.D. 343 (S.D.N.Y. 1975), aff'd 538 F.2d 10 (2d Cir. 1976), and Fairley v. Patterson, 493 F. 2d 598 (5th Cir. 1974); and S. Rep. No. 94-1011, p.6, approving the fee award in Swann v. Charlotte-Mecklenburg, 66 F.R.D. 483 (W.D.N.C. 1975). See also New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 70, n.9, 64 L.Ed. 2d 723, 738 (1980), aff'g 588 F. 2d 1253 (2d Cir. 1979).

The single standard to be uniformly applied to cases involving both private attorneys and attorneys working for public interest organizations was unambiguously established by Congress when Section 1988 was enacted. Fees under the Act are to be governed by "the same standards which prevail in other types of equally complex federal litigation, such as anti-trust cases," and fees should "not be reduced because the rights involved are non-pecuniary in nature." S. Rep. No. 94-1011, p. 6. Petitioner's cost-based proposal would bring about such an impermissible reduction. Contrary to Petitioner's assertions, Courts awarding attorney's fees under Section 1988 have consistently and uniformly applied the standards applied by the Court below in this case. As Petitioner concedes, no Court of Appeals has adopted the cost-based standard now being urged in this Court. (Petitioner's brief, p. 18). As Petitioner could not fail to point out, the only Court of Appeals to have approved a cost-based standard--the Court of Appeals for the District of Columbia -- reversed itself en banc and returned to a "market value" standard after becoming convinced on rehearing that the application of a cost-based standard would involved courts in an inappropriate inquiry inquiry of "massive proportions." Copeland v. Marshall, 641 F.2d

880 (D.C. Cir. 1980).[1/] In fact, Petitioner concedes that the standard approved by the Court below is the standard currently applicable to statutory rate setting, i.e., the rate "normally charged for similar work by attorneys of like skill in the area." (Petitioner's brief, p. 16). Nevertheless, Petitioner seeks to reverse the award of fees in this case with the bald assertion that the applicable standard is inadequate because awards in different localities to different attorneys for different types of litigation over a time span including years of high inflation vary greatly. Of course, under such widely divergent circumstances, it would be expected that fee awards would vary within a wide range. Be that as it may, if Congress intended fees in civil rights cases to fall within a specific narrow range, it would have specified such a limitation as it did when it set a fixed maximum in the recently enacted Equal Access to Justice Act, Public Law 96-481, Title II, Section 203 (codified at 5 U.S.C. §504) and Section 204 (codified as 5 U.S.C. §2412) ($75 per hour as the maximum billing rate), or as it did when it set a fixed hourly rate under the Criminal Justice Act, 18 U.S.C. §3006A. Congress, however, has not so specified. Thus Petitioner's argument that a cost-based standard

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1/ Similar arguments urging the adoption of a cost-based standard have explicitly been rejected by the overwhelming majority of courts considering the issue. E.g., Copeland v. Marshall, supra, 641 F. 2d at 899-900; Oldhan v. Erlich, 617 F. 2d 163, 168-69 (8th Cir. 1980); Rodriguez v. Taylor, 569 F.2d 1231, 1248 (3rd Cir. 1977), cert. denied, 436 U.S. 913, 56 L.Ed. 2d 414 (1978); E.E.O.C. v. Sage Realty Corp., 521 F.Supp. 263 (S.D.N.Y. 1981); Newman v. Local 1101, 491 F. Supp. 178 (S.D. N.Y. 1979); Population Services Int'l v. Carey, 476 F. Supp. 4, 9, n.5 (S.D.N.Y. 1979); Meisel v. Kremens, 80 F.R.D. 419, 422-23 (E.D. Pa. 1978). The effect of the use of a cost-based standard is to create a windfall for defendants by reducing the fees awarded public interest law firms below those awarded to private firms. For this reason, many decisions, in rejecting claims that attorneys fees should be reduced to reflect the lower salary scales of public interest attorneys, have implicitly rejected the cost-based standard because it contravenes congressional intent. New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 70, n.9, 64 L.Ed. 2d 723 (1980); Copeland v. Marshall, 641 F. 2d. 880, 900 and n. 36(D.C. Cir. 1980) (en banc); Palmigiano v. Garrahy, 616 F 2d 598 602-03 (1st. Cir. 1980); Dennis v. Chang

Footnote cont.

would be preferable to the market rate standard chosen by Congress is an argument best addressed to Congress.[1/] See Maine v. Thiboutot, 448 U.S. 1, 65 L.Ed. 2d 555, 100 S. Ct. 2502 (1980).

Furthermore, Congress has not, as Petitioner argues, prohibited upward adjustments in the customary hourly rate to better reflect factors inadequately compensated for by that rate. On the contrary, Congress has specified factors, in addition to the customary hourly rate, that should be reflected in the rate awarded. In enacting Section 1988, Congress specifically cited Johnson v. Georgia Highway Express, 488 F. 2d 714 (5th Cir. 1974) as properly establishing the type of factors to be considered in setting a fee award. In Johnson, the Fifth Circuit held that, in addition to determining the customary fee for similar work by attorneys of like ability and experience in the community, the fee award should be adjusted to reflect such factors as the risk of litigation, the preclusion of other work, and the results obtained. S. Rep. No. 94-1011, p. 6; H. Rep. No. 94-1588, p. 8. In two of the three cases cited in the Senate Report

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footnote continued: 611 F.2d 1302, 1309 (9th Cir. 1980); Reynolds v. Commey, 567 F.2d 1166, 1167 (1st Cir. 1978); Beazer v. New York City Transit Authority, 558 F.2d 10, 13 (2d Cir. 1976). See S. Rep. No. 1011, p. 6; H.R. Rep. No. 94-1588, supra at pp. 5, 8 n.16.

1/ In fact Congress is presently considering such arguments. A number of proposals have been made to limit the award of fees under Section 1988. See, e.g., S. 585 and the amendments proposed by Senator Orrin Hatch in 1981 that would prohibit fee awards under 42 U.S.C. Section 1988 to the extent that an organization is publically funded and would forbid multipliers or awards based on contingency fees. In the absence of such amendment by Congress, the language and history of 42 U.S.C. Section 1988 should preclude consideration of Petitioner's arguments by this Court.

as correctly applying the standard which Congress intended to authorize under Section 1988, the hourly fee award was adjusted upward to reflect the risk of the litigation and the quality of representation. S.Rep.No. 94-1011, p. 6, citing Davis v. County of Los Angeles, 8 E.P.D. ¶9444 (D.D. Cal. 1974) and Stanford Daily v. Zurcher, 64 F.R.D. 680 (N. D. Cal. 1974). As would be expected, Courts fashioning attorney fee awards under Section 1988 have uniformly held that the upward or downward adjustment of base rates to reflect such factors as the risk of litigation, the quality of representation, the complexity of the issues involved and the nature of the public benefit obtained is appropriate under the standards imposed by the Act.[1/] Furthermore, there is no conflict between the Circuits on this point. In Northcross v. Board of Education of the Memphis City Schools, 611 F.2d 624 (6th Cir. 1979), the

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1/Copeland v. Marshall, 641 F.2d 880, 892-4 (D.C. Cir. 1980) (en banc) (generally endorsing upward adjustments to the lodestar to account for the risk and quality factors); Cohen v. West Haven Bd. of Police Comm'rs., 638 F.2d 496, 505 (2d Cir. 1980) (pursuant to §1988, "[t]he court may adjust the lodestar figure upward or downward to take account of such subjective factors as the risk and complexity of the litigation and the quality of the representation."); Lamphere v. Brown University, 610 F.2d 46, 47 (1st Cir. 1979) (fee award of $272,600 under §1988 included a 10 percent supplement) Beazer v. New York City Transit Authority, 558 F.2d 97, 100-101 (2d Cir. 1977) (under §1988 "complexity or risk of loss on the legal issues and benefit to the clients are important considerations in any award of attorneys' fees above the hourly rate"); City of Detroit v. Grinnell Corp. ("Grinnell I"), 495 F.2d 448, 471 (2 Cir. 1974) ("Perhaps the foremost of these factors [in determining whether the fee should be adjusted] is the attorney's 'risk of litigation,' i.e. the fact that, despite the most

Ftnote cont.

Court specifically states that the routine hourly rates charged by attorneys are not and should not be the maximum which can be awarded as a proper fee because such a fee, reflecting the hourly rate alone, is not necessarily a reasonable fee under Section 1988. Id. at 638. Although the Court does eschew the use of an unearned 'bonus' to compensate attorneys solely for vindicating important but often unpopular rights, the Court approves the upward adjustment of a fee to properly reflect any of the factors not adequately compensated for in the customary hourly rate. Such an adjustment is not an unearned 'bonus'; it properly reflects the value of services given. In fact, the Court in Northcross specifically permitted an upward adjustment of 10 percent in the regular billing rates to reflect the risk factor involved in the case. Id. at 641. Northcross simply does not support Petitioner's contention that no upward adjustment of a customary rate may be awarded under Section 1988.[1/]

Ftnote cont.

vigorous and competent of efforts, success is never guaranteed."); Aumiller v. University of Delaware, 455 F.Supp. 676, 682-7 (D. Del. 1978), aff'd, 598 F.2d 354 (3rd Cir. 1979) (additional award under §1988 of 50 percent of lodestar to account for the risk factor plus 50 percent to account for the "quality and efficiency" of the representation); Davis v. County of Los Angeles, 8 E.P.D. §9444 (base fee supplemented by over $7,000); Stanford Daily v. Zurcher, 64 F.R.D. 680, 685-7 (N.D. Cal. 1974), aff'd 550 F.2d 464 (9th Cir. 1973) (fee award increased by approximately 27 percent based upon the risk and quality factors; award affirmed on appeal under §1988).

1/To the extent that the Court in Northcross would not permit an upward adjustment in the routine hourly rate to reflect the difficulty of the issues involved, it ignores the holding in Torres v. Sachs, supra, cited with approval in the legislative history of §1988, see S.Rep.No. 94-1558, that the difficulty of the issues involved must be considered both in assessing the amount of time reasonably expended and in assessing the risks of undertaking the litigation. This latter consideration would allow upward modification of the base rate under the holding in Northcross. Likewise, if the Court in Northcross would not permit an upward adjustment in the routine rate to reflect the quality of representation provided and the nature of the public benefit provided, it would ignore the holding in Stanford Daily v. Zurcher, supra at 687, which was cited with approval in the legislative history of §1988. See S.Rep.No. 94-1011, p.6. Stanford provides for upward adjustment of an award to reflect excellence of representation and the results obtained.

In light of the clearly enunciated legislative standards governing the award of fees in the instant case, and in light of the uniform treatment by the courts of both the market value standard and the factors on which the market value standard may be adjusted to provide more accurate compensation for the services rendered, it is absurd for Petitioner to assert that the Court of Appearls has ignored its supervisory responsibility by summarily affirming, without formal opinion, the award of attorneys' fees in this case.

The legislative history of §1988 dictates the market rate standard as the one to be used in fashioning fee awards and permits modification of the market rate to reflect such factors as those hallmarked by the Court below. That same history precludes the use of either of the fee-limiting mechanisms Petitioner would have this Court adopt in cases where fee awards are being sought by legal services or public interest organizations.

Likewise, in the absence of an obvious and exceptional showing that the District Court's decision was erroneous, its determinations regarding the propriety of the amount of fees awarded and regarding Petitioner's claim of duplication, resting as they do on the knowledge, experience and expertise of the District Judge and on his familiarity with the progress of the litigation, were properly left undisturbed by the Court of Appeals. See Maher v. Gagne, 448 U.S. 65 L.Ed2d 653, 661 (1980), citing Graver Tank & Mfg. Co. v. Linde Air Prod. Co., 336 U.S. 271,93 L.Ed.2d 672 (1949). Accord Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980) (en banc); Siegel v. Merrick, 619 F.2d 160, 161, 164 n.9 (2d Cir. 1980).[1/]

1/ The Court below, based upon its day-by-day monitoring of the progress of the litigation held that the complexity of the issues

Ftnote cont.

CONCLUSION

Wherefore, this Court should deny the petitioner for a Writ of Certiorari to the Court of Appeals for the Second Circuit.

Date: New York, New York
February 22, 1982

Respectfully submitted,

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Civil Division

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Ftnote cont.

presented "fully warranted the hours devoted to [the proceedings before the Court]," 512 F.Supp. at 684, and based on that monitoring and on the affidavits submitted by plaintiffs, the District Court specifically rejected Petitioner's claim that the efforts of plaintiffs' counsel were duplicative. 512 F.Supp. at 684.

RECEIVED
MAR 1 1982

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

91 - 1374

BARBARA BLUM, individually and as Commissioner of the New York State Department of Social Services,

Petitioner,

-against-

ELLEN STENSON, individually and on behalf of all other persons similarly situated,

Respondents.

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of February, 1982, copies of Respondent's Motion to Proceed in Opposition to Petition for a Writ of Certiorari in unprinted form and to proceed in forma pauperis and Respondents' Brief in Opposition to the Petition were mailed to Robert Abrams, Marion Buchbinder, of counsel, attorney for Petitioner Barbara Blum, Two World Trade Center, New York, New York 10047. I further certify that all parties required to be served have been served.

JOHN KIRKLIN, Esq.
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ORIGINAL

Office-Supreme Court, U.S.
FILED
MAR 1 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. 81-1374

BARBARA BLUM, individually and as Commissioner of the New York State Department of Social Services,

Petitioner,

against

ELLEN STENSON, individually and on behalf of all other persons similarly situated,

Respondent.

MOTION TO PROCEED IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI
IN FORMA PAUPERIS

Pursuant to Rule 46, Paragraph I, of the Rules of this Court, motion is hereby made that the Respondent be allowed to bring her Motion in Opposition to Petition for a Writ of Certiorari in unprinted form and to proceed in forma pauperis for the reasons stated in the attached affidavit of Respondent.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

No. 81-1374

BARBARA BLUM, individually and as Commissioner of the New York State Department of Social Services,

Petitioner

v.

ELLEN STENSON, individually and on behalf of all other persons similarly situated,

Respondent

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI IN UNPRINTED FORM AND TO PROCEED IN FORMA PAUPERIS

I, Ellen Stenson, being first duly sworn, depose and say that I am the Respondent in the above-entitled matter; that I am required to file a reply to Petitioner's application for a Writ of Certiorari; that in support of my motion to be permitted to reply in unprinted form and without paying costs, I state that because of my poverty, I am unable to pay the costs of said proceeding or to pay to have my reply printed.

I further swear that the responses I have made to the questions and instructions below relating to my ability to pay the costs of printing my response to the Petition herein are true.

1. Are you presently employed?

Answer: I am not presently employed. The last time I worked was, I believe, in 1928. I am now 81 years old, and cannot remember what I was paid. I may have received no salary because it was a nurse's training program.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interests, dividents, or other source?

Answer: In the past twelve months the only income I have received is income from my Social Security check and from my late husband's pension plan. I may have earned a few dollars interest on my savings account, but I don't remember exactly. My Social Security was and is $297.00 per month. My pension check was and is $131.00 per month. I believe that before July of 1981 my Social Security check was less than $297.00 but I don't remember exactly.

3. Do you own any cash or checking or savings account?

Answer: Yes, I have a savings account. The total value of the savings account is $600.00. The money in the account is from my social security and pension checks.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Answer: No, I own nothing else.

5. I have no one depending on me for support and have not had anyone so depending on me for years.

In addition to the information given above, please consider in support of my motion the fact that I was granted permission to commence this action in the District Court in forma pauperis by an order dated December 18, 1978, and I have been represented throughout the proceeding by The Legal Aid Society, John Kirklin, Director of Litigation, The Civil Appeals and Law Reform Unit, without charge or fee of any kind.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Ellen K. Stenson
ELLEN STENSON

Subscribed and Sworn to before me
this 10 day of February 1982.

Daniel F. Barrett
NOTARY

DANIEL F. BARRETT
Notary Public, State of New York
No. 31-0170655
Qualified in Kings County
Commission Expires March 30, 1983

Let the applicant proceed without without prepayment of costs or fees without the necessity of printing.

_____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-1374

BARBARA BLUM, individually and as Commissioner of the New York State Department of Social Services,

Petitioner,

against

ELLEN STENSON, individually and on behalf of all other persons similarly situated,

Respondent.

STATE OF NEW YORK)
COUNTY OF NEW YORK):

DANIEL BARRETT, being duly sworn deposes and says:

I am employed by The Legal Aid Society, 11 Park Place, New York, New York.

On February 10, 1982, I went to the home of Mrs. Ellen Stenson and read the foregoing affidavit to her. Mrs. Stenson told me that she heard and understood the facts stated therein and, in my presence, signed the affidavit, affirming the truth of the contents thereof.

Daniel Barrett

DANIEL BARRETT

Sworn to before me this
10th day of February 1982

Ann Moynihan

ANN MOYNIHAN
NOTARY PUBLIC

ANN M. MOYNIHAN
Notary Public, State of New York
No. 4719356
Qualified in Kings County
Commission Expires March 30, 1983

Amicus Brief

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FILED
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CLERK

No. 81-1374

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1981

BARBARA BLUM, individually and in her capacity as Commissioner of the New York State Department of Social Services,

Petitioner,

v.

ELLEN STENSON, individually and on behalf of all other persons similarly situated,

Respondent.

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BRIEF OF AMICI CURIAE STATES OF WASHINGTON, ALABAMA, ARIZONA, ARKANSAS, COLORADO, DELAWARE, FLORIDA, HAWAII, ILLINOIS, INDIANA, LOUISIANA, MASSACHUSETTS, MINNESOTA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NORTH CAROLINA, NORTH DAKOTA, PENNSYLVANIA, SOUTH CAROLINA, VERMONT, WISCONSIN AND WYOMING IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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No. 81-1374

IN THE
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October Term, 1981

BARBARA BLUM, individually and in her capacity as Commissioner of the New York State Department of Social Services,

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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BRIEF OF AMICI CURIAE STATES OF WASHINGTON, ALABAMA, ARIZONA, ARKANSAS, COLORADO, DELAWARE, FLORIDA, HAWAII, ILLINOIS, INDIANA, LOUISIANA, MASSACHUSETTS, MINNESOTA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NORTH CAROLINA, NORTH DAKOTA, PENNSYLVANIA, SOUTH CAROLINA, VERMONT, WISCONSIN AND WYOMING IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF THE AMICI

The concern of the amici states in this case is almost self-evident. It involves the Federal Court's imposition of what amounts to punitive damages in the form of super attorney's fees to be paid out of state treasuries, coupled with the lack of uniform standards to be used in determining when an award of attorney's fees is appropriate and how an assessment of fees is to be made.

Each of the amici states is currently faced with large, and ever increasing, § 1983 caseloads. Virtually every "denial," by state or local officials, of any right, privilege or immunity, whether constitutional or statutory, whether real or imagined, is today claimed as a denial of 42 U.S.C. § 1983.

Substantially any rejection of any perceived entitlement now results in a § 1983 action alleging the denial of some federally-protected right.

The reasons for this are obvious. Justice Powell's farsighted predictions in Maine v. Thiboutot, 448 U.S. 1, 24 (1980) (Powell, J., dissenting) have become reality. Ingenious pleaders are in fact finding ways to recover attorney's fees against state and local defendants in almost any suit. Indeed, the attorney's fees rules applied by most district and circuit courts today are so liberal as to make it virtually actionable malpractice for a practitioner not to plead § 1983 and thus, potentially at least, shift the burden of paying the fees to the public treasury.

As will be illustrated later, the generosity with the states' monies by the federal courts serves as an inducement to plaintiffs' attorneys to find some way (and increasingly less ingenuity is required) to characterize suits as "civil rights" actions in order to shift attorney's fees if successful. This, together with the interpretation of the legislative history of 42 U.S.C. § 1988 as warranting a presumption that attorney's fees must ordinarily be awarded unless special circumstances render the award unjust, e.g., Bunn v. Central Realty of Louisiana, 592 F.2d 891 (5th Cir. 1979), indicate that the costs of litigation for the states are approaching alarming proportions.[1]

1 Indeed "special circumstances" as a limitation on attorney's fees is

Thus, unless this trend is reversed and some more responsible guidelines are laid down by this Court, the states may soon face two alternatives: (1) To forego all costs of litigation in an attempt to minimize fee awards, and settle with most, if not all, civil rights' plaintiffs even where the claim borders on the absolutely frivolous; or (2) face unmanagable and unbudgeted drains on state treasuries (and indeed the real possibility of bankrupting some small and fiscally-strained units of local government) by continuing to litigate

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itself in danger of becoming meaningless verbiage. See, e.g., Seattle School District v. State of Washington, 633 F.2d 1338 (Ninth Cir., 1980); probable jurisdiction noted 10/13/81, Washington v. Seattle School District, No. 81-9.

claims which are arguably shallow and meritless.

Therefore, it is the state's interests in a correct and responsible national realization of the legislative intent behind 42 U.S.C. § 1988, in having established uniform standards regarding the determination and assessment of attorney's fees, in preserving unchilled their own right to judicial determinations of controversies, and in protecting their state treasuries, which prompts this brief in support of New York's Petition for a Writ of Certiorari.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL AND MERIT FULL REVIEW BY THE COURT.

I. The Decision Below Typifies A Departure From The Actual Intent of 42 U.S.C. 1988 By Courts Across The

Country, And As Such Should Be Subjected To The Plenary Scrutiny Of This Court.

Congress, in enacting 42 U.S.C. § 1988, intended to provide a means by which even indigent civil rights' plaintiffs could obtain their day in court. The purpose of the Civil Rights Attorney's Fees Awards Act of 1976 was to allow such plaintiffs with a legitimate claim to attract competent counsel to assist them in securing those rights.[2] Such legislative intent may be fully realized by the award of attorney's fees for the amount of work actually and necessarily performed in order to secure the result obtained.

2 H.R. Report, No. 1558, 94th Cong. 2nd Sess. (1976), hereafter "H. Rep."; Sen. Report, No. 1011, 94th Cong. 2nd Sess. (1976), hereafter "Sen. Rep.".

The lower courts' use of bonuses and multipliers results all too often in windfalls to plaintiffs' attorneys, frequently already publicly-funded, at the expense of the State and local treasuries. Such windfalls are simply not necessary and Congress should not be presumed to have intended their use.

The use of such bonuses rests as well upon an absolute fiction, a fiction which amounts almost to an insult to both the bench and bar. The notion that without the payment of bonus "super fees," sometimes through the use of unconscionable multipliers, competent, experienced counsel would be unavailable, is put to the lie by the very facts giving rise to this Petition. Here three young, obviously aggressive, intelligent and dedicated,

but nevertheless inexperienced lawyers, employed by the New York Legal Aid Society, were quite able to protect the medicaid benefits of their client class. No lion of the New York Bar was needed, nor, amici suspect, did Respondent Stenson feel any need to seek one out. Rather, the legal aid counsel were doing exactly what they were employed to do, and what they would have done had the case arisen in 1975, prior to the enactment of § 1983!

In truth, lawyers are literally lining up to bring § 1983 actions; private attorneys as well as legal aid or legal services societies, and they will continue to do so without the use of bonus-type awards. They will do so because of the expanding scope of § 1983 and the liberal availability of

attorney's fees, at market rates; but they will also do so out of a traditional and deep sense of responsibility felt by the bar toward those whose legitimate rights have been abridged and for whom access to the courts (or the administrative process) is essential. The suggestion, upon which any bonus or multiplier award is based, that Congress intended attorneys, or their employing legal aid offices, many of whom are already publicly funded, to receive more fees than was reasonably necessary, just because these fees are to come from some public treasury (other than Congress' own) is unfounded, and should be examined by this Court.

It is equally unfounded to suggest (as the lower courts unconsciously do in reciting the invariable litany about the need for bonuses in order to attract "capable, experienced counsel") that those courts themselves are not able to be so informed as to the merits of a plaintiff's legitimate claim, without the presence and assistance of counsel for whom the availability of a "super fee" was the primary motivation, and that Congress had that in mind. Again, the District Court in this case was apparently not hindered by the fact that plaintiffs' three attorneys were possessed of an aggregate of 11 1/2 years of experience at the end of the case, nor by the relatively modest 1 1/2 years at the bar at the outset of the case of the lawyer who did the

lion's share of the work (Pet. App. 6a)

There is another assumption underlying the awarding of every bonus; that Congress implicitly, if not explicitly, intended that the simple word "reasonable" should be so construed. That assumption, amici submit, is simply wrong, and the lower court's continued reliance upon it deserves this Court's plenary review.

That Congress had in 1976, as one of its purposes, encouraging, or even allowing, the recovery of 1 1/2, 2 or even 3 times as much in fees from public sources than would be paid to a successful attorney by a private fee-paying client strains credibility. There is simply no basis in § 1988, or its legislative history, for the notion that Congress meant to create a

contingent fee incentive system of protection for the legitimate civil rights of this nation's citizens, and this Court should grant certiorari in order to give that practice the close and critical scrutiny it deserves.

In fact, the legislative history makes it very clear that Congress intended just the opposite. The Fifth Circuit's Opinion in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (Fifth Cir., 1974) a Title VII case, was commented upon favorably in the legislative reports underlying the 1976 Act. See, H. Rep., p. 8; Sen. Rep., p. 6; U.S. Code & Administrative News, 1976, p. 5908. Apparently since overlooked by many district courts is the following language from Johnson, which Congress explicitly had in mind:

> "To put these guidelines into perspective and as a caveat to their application, courts must remember that they do not have a mandate under Section 706(k) to make the prevailing counsel rich. Concomitantly, the Section should not be implemented in a manner to make the private attorney general's position so lucrative as to ridicule the public attorney general. The statute was not passed for the benefit of attorneys but to enable litigants to obtain competent counsel worthy of a contest with the caliber of counsel available to their opposition and to fairly place the economical burden of Title VII litigation. . . ." 488 F.2d 714, 719.

Justice Powell's farsighted dissent in Maine v. Thiboutot, 448 U.S. 1, 24 (1980) recognized the then potential problems associated with the "liberal" but improper use of § 1988. These potential problems have now become reality for the states, due to

the complete erosion of the protection of the "American Rule" as enunciated in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975). Justice Powell points out that there is nothing in the legislative history of the Civil Rights Attorney's Fees Awards Act of 1976[3] which condones such use of the statute[4]

An examination of the legislative history of § 1988 shows clearly that neither the Senate nor the House contemplated anything other than an award of a "reasonable" attorney's fee.[5] Such a reasonable fee would be

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3 Pub. L. 94-559, 90 Stat. 2641 (1976).

4 Maine v. Thiboutot, 448 U.S. 1 at 24, 25 (1980).

5 H. Rep., § D.3. at 9; Sen. Rep. at 2.

adequate to attract competent counsel without producing windfalls. In fact, the Senate Report states: "In computing the fee, counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, for all time reasonably expended on a matter."[6]

The rationale used by the District Court and Court of Appeals in this case, one which is relied upon generally to support bonus awards, is disingenuous. The use of such rationale in this case is further demonstrative of the inappropriateness of bonus fee awards in this case.

The District Court several times cites the "complex" nature of the case.

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6 Id. at 6.

He describes the legal issues involved, for example, as ". . . both novel and complex, involving a complicated interaction between state and federal law and a contract between the state and federal governments. . . ." Pet. App. 5a, 6a. The Court's bonus is based, in large part at least on this "complexity." Pet. App. 12a. Yet the Court disposed of this "complex" case by summary judgment, entered only nine months after the Complaint was filed, and after only, apparently, one set of interrogatories! Stenson v. Blum, 476 F.Supp. 1331 (S.D.N.Y. 1979)

The Court of Appeals likewise leaned heavily on the "complex" nature of the case in affirming the award. Pet. App. 3a. It did so, however, in an unpublished opinion which, under §

O.23 of its own rules, is to be used only for cases were the panel believes no jurisprudential purpose would be served by a written opinion!

The District Court also cited in support of its generosity with New York's public funds the "risk of loss" associated with the case. Pet. App. 7a, 12a. Risk of loss to whom? The New York Legal Aid Society stood to lose nothing; it is not a fee generating office. The three attorneys involved undertook no risk; they are salaried staff attorneys of the office. The class of medicaid beneficiaries risked nothing; they were to pay no fees, win or lose. What "risk of loss" justifies a bonus award of public money in this and similar cases? None, amici suggest, and this Court should likewise

give plenary review to that rationale.[7]

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7 Complexity and risk of loss are not the only factors relied upon in awarding bonus fees which demand plenary review by this Court. In Jenson v. Lobdell, D.C. Oregon, Civil No. 78-1008PA (6/23/81), the District Court, besides relying upon "novel and difficult" issues (the case was settled) and a "substantial commitment of time" (the Court two sentences later in the opinion conceded that "time limitations were not particular imposing") cited a factor, in awarding fees based upon a multiplier of two, which should be particularly disturbing. This case was described as a "relatively undesirable" one in which plaintiffs' attorneys "maintained a good relationship with their class clients under difficult circumstances." Lawyers, by our own professional standards, bind ourselves to maintain good relationships with clients. Failure to do so may, under some circumstances, result in disciplinary action. This Court must critically examine, in light of Congress' announced intent, a system which rewards attorneys with twice a reasonable hourly rate, paid with the taxpayers' money, because they did what they saw as an oath to do in any case. See, Johnson v. Georgia Highway

II. Because The Decision Below Illustrates The Improper Interpretation And Use of 42 U.S.C. § 1988 By The Federal Courts, Resulting In Undue And Unwarranted Hardship On The States, This Case Presents A Question of Substantial Importance.

Bonuses are not the only concern of the states. The problem lies in the fact that the Federal Courts have misinterpreted the fundamental directive of § 1988. The pertinent part of the statute reads "[t]he court, in its direction, may allow the prevailing party, . . . , a reasonable attorney's fee."[8] (Emphasis supplied) The legislative history of this language clearly shows that Congress

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Express, supra, pp 12-13.

8 42 U.S.C. § 1988.

did not intend to require the Courts to award fees to the prevailing plaintiff in every case, but only to use discretion in determining whether to allow a fees award.[9] However, the lower courts' unguided interpretation of this language has resulted in the near universal use of a strict liablity standard when fees are sought by the "prevailing" plaintiff.[10]

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9 H. Rep., § D.2. at 8. In fact, there are a number of statutes in which Congress requires the courts to award attorney's fees: E.g., 7 U.S.C. 499q(b) (Perishable Agricultural Commodoties Act); 15 U.S.C. 1640(a) (Truth-in-lending Act); 46 U.S.C. 1277 (Merchant Marine Act of 1936); 47 U.S.C. 206 (Communications Act of 1934). Presumably, had Congress intended such a rule with respect to the Fees Act in 1976, it would have said so.

10 As of March, 1981, there had been at least 307 § 1983 suits reported in the national reporter system in which § 1988 attorneys' fees were also sought. An unusually high

The problem is not limited to the imposition of a strict liability standard on losing defendants. That problem, while great, is only the tip of the iceberg. The larger, more financially burdensome problem

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number of those suits resulted in plaintiffs prevailing (271). Of the prevailing plaintiffs, 212 were awarded attorneys' fees. Sixty-nine percent (69%) of all suits resulted in attorneys' fees being awarded to plaintiffs. Seventy-eight (78%) of all prevailing plaintiffs were awarded attorneys' fees. In most of the others it can be assumed that no fees were yet requested, or the Court simply did not discuss that aspect of the case in the reported opinion. These figures do not take into account all the unreported cases which never made it past the trial court level. Those figures would be nearly impossible to ascertain at this point. (See Report to the National Association of Attorneys General of the Ad Hoc Subcommittee To Study The Effects of 42 U.S.C. § § 1983 and 1988. April, 1981)

resulting from the lower courts' exercise of their discretion, is the broad and varied interpretation of what constitutes a "reasonable" fee.

Congress gave the Courts guidelines by which a "reasonable" fee should be computed.[11] However, using their "discretion," the Courts have deviated greatly from the Congressional guidelines and intent. The use of multipliers and awards of bonuses is merely illustrative of this. Rewarding unnecessary duplication of effort, by intervenors as well as multiple attorneys representing the same client, as in this case, is also a significant problem. Perhaps a case arising in the

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11 H. Rep., § D.3 at 8. See, Johnson v. Georgia Highway Express, Inc., supra, page 12, for a list of factors to be considered.

State of Washington is best illustrative of the potential magnitude of this factor, absent reasonable and responsible guidelines from this court.

In Hoptowit v. Ray, E.D. Wash., No. 79-4872 (1980), appeal pending in Ninth Circuit Court of Appeals, No. 80-3356, the State of Washington's major prisoners' rights lawsuit, certain named individual prisoners were represented by individual private counsel, even though those prisoners were at the same time members of the class represented by Prison Legal Services and the United States Attorney's Office[12] who together did virtually 100 percent of the work in

12 Having been "directed" to appear by the District Court as an "amicus with all the rights of a party."

the case, and who requested no attorneys' fees at the conclusion of the trial. Other prisoners and/or public interest organizations intervened, and were represented either by private attorneys or organizations. The District Court, after refusing an evidentiary hearing, awarded approximately $123,000 in attorneys' fees to these attorneys and organizations, who accomplished or contributed virtually nothing to the advancement of the lawsuit, and who in many cases spent literally days sitting silent watching depositions be taken and "monitoring" the trial.[13]

A further example is Balderas v.

13 For what Congress had in mind regarding such practices, see, Johnson v. Georgia Highway Express, Inc., supra, page 12.

Matheson, No. C-75-220, D.C., Utah 1979, likewise a prison case, in which the United States Justice Department also appeared as an amicus on behalf of inmates and did almost all of the work. The local Legal Services Office was awarded over $21,000.00 for sending a lawyer to attend depositions and hearings and "monitor" pleadings. The Court awarded $2,000.00 for preparation of interrogatories which were never served on the defendants or filed with the Court.

These cases illustrate the District Courts' all too lax exercise of discretion in determining and assessing fee awards. These indiscretions, coupled with the evolution of the law of § 1988, spell legal and financial trouble for the

states.

Since the Fees Act became law in 1976, the scope of § 1983 now includes the following: "Prevailing" plaintiffs may recover attorneys' fees even if a § 1983 claim has not been litigated, Maher v. Gagne, 448 U.S. 122 (1980); a plaintiff may not even have to argue his case to be entitled to an award of attorneys' fees, Ross v. Horn, 598 F.2d 1312 (Third Cir., 1979); Southeast Legal Defense Group v. Adams, 436 F.Supp., 891 (D. Ore. 1977); § 1988 fees can be awarded to a plaintiff who prevailed on a non-section 1983 claim, so long as a "substantial" 1983 claim is alleged. Nadeau v. Helgemoe, 581 F.2d 275 (First Cir., 1978); § 1983 no longer need even be pleaded in order to award attorney's fees under § 1988, La

Raza of S. Alameda County v. Volpe, 440 F.Supp. 904 (N.D. Cal. 1977); White Mountain Apache v. Bracker, ____F.Supp.____ (D.C., Arizona, 1981), Ninth Cir., No. 81-5348; and finally, defendants who have contested the initial fee award are subject to an additional fee award assessment, Torres v. Sachs, 69 F.R.D. 343 (S.D.N.Y. 1975).

CONCLUSION

This broad and unbridled growth of § 1983 has made litigation under §1983 relatively risk-free for plaintiffs, who stand to be compensated if they prevail on any aspect of their case, and financially burdensome and time consuming for the states and municipalities which are subject to the near strict liability standard

practiced by the Courts.[14] This fact, along with the interpretation in Maine v. Thiboutot of the phrase in 42 U.S.C. § 1983 "and laws," means that the number of "civil rights" suits against the states will continue to grow, and this growth will inevitably cause an explosion of § 1988 liability for the states.[15] Due to the failure

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14 See, dissenting opinion of Powell, Jr., in Owen v. City of Independence, 445 U.S. 622 (1980).

15 While the figures themselves are not large, the experience reported recently by the Tennessee Attorney General's Office can perhaps best illustrate the potential problem facing the states in the § 1983/1988 area. In 1978-79 Tennessee paid civil rights attorneys' fees of $7,020.91. In 1980 this amount rose to $25,140.42. In the first two months of 1981, the State of Tennessee had already experienced civil rights attorneys' fees awards of $30,795.75!

Municipalities, even more so than states, are affected by this

of the lower courts to properly exercise discretion in determining the propriety of fee awards, and the lack of uniform standards to be used in assessing "reasonable" fee awards, this Court must provide some responsible guidance. This Petition presents such an opportunity, and it should be taken. The Writ should be granted and the case set for full briefing and argument on the merits.

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explosion. As of February 13, 1981, about one-third of the membership of the National Institute of Municipal Law Officers, in responding to a survey, reported over three bilion dollars in claims, exclusive of attorneys' fees! Even allowing for the percentage of frivolous claims and the inflated amount prayed for, the amount of "legitimate" claims, especially to the small states and municipalities is enough to choke the proverbial goat.

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Petitioner's Brief

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No. 81-1374

IN THE

Supreme Court of the United States

October Term, 1983

BARBARA BLUM, individually and in her capacity as Commissioner of the New York State Department of Social Services,

Petitioner,

against

ELLEN STENSON, individually and on behalf of all other persons similarly situated,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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Questions Presented

1. In fashioning an attorney's fee award under 42 U.S.C. § 1988, did the courts below err in determining an hourly rate that was not based on consideration of the costs involved in the delivery of the services provided?

2. Whether 42 U.S.C. § 1988 authorizes a "bonus" award over and above the amount of attorney's fees determined by multiplying the reasonable number of hours expended by a reasonable hourly rate, and, if so, whether the courts below abused their discretion in awarding a 50% "bonus" in this case?

3. Whether the District Court abused its discretion (a) in failing to require respondent's attorneys to specify how their legal services were divided to avoid duplication of effort in their attorney's fee application; and (b) in failing to disallow claimed hours not based on contemporaneous time records?

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No. 81-1374

IN THE

Supreme Court of the United States

October Term, 1983

BARBARA BLUM, individually and in her capacity as Commissioner of the New York State Department of Social Services,

Petitioner,

against

ELLEN STENSON, individually and on behalf of all other persons similarly situated,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONER

Opinions Below

The order and opinion of the United States Court of Appeals for the Second Circuit, filed on October 19, 1981, affirming the order of the District Court with respect to an attorneys' fee award is unpublished, but the decision is reported at 671 F. 2d 493. The opinion is reproduced in the Joint Appendix at pp. 363-365.

The opinion of the District Court awarding attorneys' fees, filed on April 2, 1981, is officially reported at 512 F. Supp. 680, and is reproduced in the Joint Appendix at pp. 351-359.*

Prior opinions in this case, which are not sought to be reviewed by the petition, are officially reported at 476 F. Supp. 1331 (S.D.N.Y. 1979) (J.A. 142-166), *aff'd*, 628 F.2d 1345 (2d Cir.), *cert. denied*, 449 U.S. 885 (1980).

Jurisdiction

This Court has jurisdiction to review the judgment in question by writ of certiorari under 28 U.S.C. § 1254(1). The order and judgment of the Court of Appeals sought to be reviewed was entered and filed on October 19, 1981. The petition for certiorari was filed with this Court on January 15, 1982 and was granted by order of this Court on May 31, 1983.

Statute Involved

The Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. 94-559 (Oct. 19, 1976), 90 Stat. 2641, amending 42 U.S.C. § 1988, states in relevant part:

> In any action or proceeding to enforce a provision of Sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [Sections 1981, 1982, 1983, 1985 and 1988 of U.S.C. Title 42], Title IX of Public Law 92-318 [Title IX of the Education Amendments of 1972, Sections 1681-1686 of U.S.C. Title 20], or Title VI of the Civil Rights Act of 1964 [Sections 2000d, *et seq.*, of U.S.C. Title 42], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

* References to the Joint Appendix are hereinafter denominated as "J.A.".

Statement of the Case

A. Background

Respondent commenced this action against petitioner Blum, then Commissioner of the New York State Department of Social Services, the Secretary of the Department of Health, Education and Welfare ("federal defendant"), and the Commissioner of the New York City Department of Social Services ("city defendant"), on December 18, 1978, in the United States District Court for the Southern District of New York. According to the complaint (J.A. 14-30), respondent had received Medicaid coverage (42 U.S.C. § 1396 *et seq.*) when she became eligible for Supplemental Security Income ("SSI") benefits (42 U.S.C. § 1381 *et seq.*).* She thereafter received a notice from the federal defendant dated July 3, 1978, stating that her SSI benefits were being terminated, and advising her to contact her local social services agency "for information about any change in your Medicaid eligibility caused by this action" (Compl. ¶ 36; J.A. 22-23). Respondent did not follow that advice, and in November, 1978, her Medicaid coverage was terminated (Compl. ¶¶ 37-39, J.A. 23).**

The complaint alleged that defendants' practice of terminating Medicaid benefits upon the termination of SSI

* Respondent had been determined eligible for Medicaid by the federal defendant under an Agreement between that defendant and the State of New York entered into pursuant to 42 U.S.C. § 1383c. Under that Agreement, all New York residents determined eligible for SSI by the federal defendant were automatically eligible for Medicaid. See N.Y. Social Services Law ("NYSSL") § 366(2).

** Petitioner required New York's local social services districts (the City of New York and each county in New York State outside the City of New York, NYSSL § 61) to notify former SSI recipients that their Medicaid benefits were being terminated because their eligibility for those benefits had been contingent on their SSI eligibility, but that they could apply to the local district for "Medicaid only" (J.A. 76). Respondent did not receive that notice.

benefits, without a determination of Medicaid eligibility independent of SSI eligibility, violated the Social Security Act and its implementing regulations, the Due Process Clauses of the Fifth and Fourteenth Amendments, and the Equal Protection Clause of the Fourteenth Amendment (Compl. ¶¶ 49-51, J.A. 26-27). Jurisdiction was alleged under 28 U.S.C. §§ 1331, 1343(3), and 1361 (Compl. ¶ 7, J.A. 16). The relief sought was a judgment declaring that practice or policy violative of the above statutory, regulatory, and constitutional provisions, a permanent injunction, damages for the named respondent only, and attorneys' fees (J.A. 28-30).

Three months subsequent to the commencement of this action, after plaintiff's short set of interrogatories had been answered (J.A. 60-64), plaintiff moved for class certification and a classwide preliminary injunction. On the same date, two proposed plaintiff-intervenors (who, like respondent, were represented by the Legal Aid Society) moved to intervene and joined plaintiff's request for the above relief (J.A. 77-89, 90-103), filing a memorandum of law repetitive of respondent's. In response, defendants cross-moved to dismiss the complaint (J.A. 104-119). Although they agreed that plaintiff was entitled to a hearing prior to the termination of her Medicaid benefits, they disagreed concerning which agency was required to provide the hearing.* Plaintiff and the proposed intervenors then cross-moved for summary judgment, repeating their original arguments and responding to the arguments raised in the motions to dismiss (J.A. 120-139).

On September 18, 1979, the district court judge rendered an opinion (J.A. 142-166) dismissing plaintiff's claims

* Petitioner argued that the federal defendant was responsible for providing a hearing to anyone whose Medicaid benefits were terminated as a result of the federal government's decision to terminate such person's SSI benefits.

as against the federal and city defendants, denying the intervention motions, and certifying a class (J.A. 148) defined as:

> New York State residents who received Medicaid due to their eligibility for SSI and whose Medicaid benefits have been terminated because of subsequent ineligibility for SSI without having received one or more of the following: (a) an *ex parte* determination of continued eligibility for Medicaid, independent of eligibility for SSI; (b) timely and adequate notice of such termination; (c) an opportunity for a hearing.

The district court judge determined that federal regulations required petitioner to make an "*ex parte*" determination of continued Medicaid eligibility independent of SSI eligibility, and to provide timely and adequate notice and a hearing prior to terminating the Medicaid benefits of former SSI recipients (J.A. 162). Additionally, the decision "enjoined" petitioner to restore Medicaid benefits to respondent and the members of her class, and to continue such benefits until the above three procedures were completed (J.A. 165-166).

A final judgment (J.A. 181-188) and an order describing the notice to be sent to class members (J.A. 254-255) were entered on December 26, 1979 and January 11, 1980, respectively; and were amended, on petitioner's motion, by order entered February 21, 1980 (J.A. 267-269).

Anticipating that the restoration requirement would benefit few class members while providing Medicaid to many persons currently ineligible to receive it, petitioner filed an appeal contending that the automatic restoration of Medicaid benefits to class members whose benefits had been terminated prior to the entry of the judgment constituted retroactive relief prohibited by the Eleventh Amendment of the United States Constitution, and represented an abuse

of the District Court's discretion.* On May 13, 1980, in an unpublished decision rendered pursuant to § 0.23 of the Rules of the Second Circuit (J.A. 275-276), the Court of Appeals acknowledged "it is difficult to draw the line between retrospective and prospective relief", but dismissed petitioner's Eleventh Amendment argument with the single statement "in this case we think the line was properly drawn" (J.A. 276). The Court of Appeals similarly rejected petitioner's contention that the restoration requirement was an abuse of discretion (*id.*). Petitioner's petition for a writ of certiorari to review that decision was denied on October 6, 1980 (449 U.S. 885).

B. The Attorney's Fee Decisions

By notice dated November 26, 1980 (J.A. 305), respondent's three attorneys moved for an award of attorneys' fees against petitioner pursuant to 42 U.S.C. § 1988. They originally claimed an award of $128,988.00 for a total of 876.75 hours (J.A. 305-343), but subsequently modified their request to $118,968.00 for a total of 809.75 hours.** Ann Moynihan, who had approximately one and a half years of experience when she started on this case and three years experience at the bar at its completion, and who had little or no prior experience in cases of this type (see J.A. 320, 332-33), claimed an hourly rate of $95 for approximately 488 hours of work performed during the period December 4, 1978—June 27, 1980 (J.A. 320-331, 345) for a total of $46,343.00 (J.A. 353). Ms. Moynihan's estimate of hours

* No appeal was taken from the underlying decision on the merits (see J.A. 270).

** By supplemental affidavits sworn to on January 15, 1981 (J.A. 344-350), respondent's counsel deleted from their fee request compensation for 63 hours claimed by Paula Galowitz for legal work in connection with respondent's appeal against the city defendant (to which petitioner was not a party) and for four hours spent by Ann Moynihan proofreading and compiling the summons and complaint and motion for a temporary restraining order, for a total reduction of 67 hours.

worked were claimed to be based on "contemporaneously kept records . . . or were reconstructed from the file maintained in this case" (J.A. 320). Paula Galowitz, who had not quite three years of experience when she started on this case and three and one-half years at the time she completed her work on the substantive issues against petitioner, and who also had little prior experience in cases of this type (see J.A. 335), requested an hourly rate of $100 for approximately 166 hours of work performed during the period March 14, 1979—February 27, 1980 (J.A. 334-343, 345) for a total of $16,625.00 (J.A. 353). Ms. Galowitz' claim of hours expended was said to be derived from "time sheets and case cards and from consultations with my co-counsel" (J.A. 335). Arthur Fried, who had not quite four years of experience when he started on this case and five years at the time of its completion, requested an hourly rate of $105 for approximately 156 hours of work performed during the period March 17, 1979—November 21, 1980 (J.A. 308-315) for a total of $16,344.00 (J.A. 353). In addition, respondent's counsel claimed a "bonus" equal to 50% of the underlying claim.

On March 26, 1981, the district court, without an evidentiary hearing, rendered its decision (J.A. 351-359) granting plaintiff's counsel the entire amount requested as attorneys' fees.* The district court found the requested rates to be reasonable by comparison with the rates of $60 per hour for a fourth year associate and $120 per hour for partners awarded in *Population Services International* v. *Carey*, 476 F. Supp. 4 (S.D.N.Y. 1979); and by comparison with rates of $150-$175 per hour awarded to experienced antitrust attorneys (whose regular billing rates ranged from $150 to $250 an hour) in *City of New York* v. *Darling-Delaware*, 440 F. Supp. 1132 (S.D.N.Y. 1977) (J.A. 355).

* The district court opinion contains a typographical error in the chart setting forth Mr. Fried's time as 115 hrs. 40 mins. (J.A. 353). Mr. Fried claimed 155 hrs. 40 mins. (J.A. 315). However, the lodestar of $16,344 awarded Mr. Fried (J.A. 353) is equal to 155 hrs. 40 min. multiplied by an hourly rate of $105.

Although more than two-thirds of the total hours claimed by respondent's counsel involved activities in which more than one attorney was involved, District Judge Sweet rejected petitioner's contention that respondent's counsel's efforts were duplicative. He stated that he was "satisfied by the affidavits submitted by plaintiffs' counsel that the work performed outside of the courtroom was divided in such a way as to avoid duplication" (J.A. 357-58), although no such division of labor was indicated in the time records submitted; and he determined that the hours claimed were not excessive because he felt that the issues presented were "complex" (J.A. 357), although no factual support for that conclusion was given. Finally, Judge Sweet granted respondent's counsel's request for an additional 50% "bonus" or "incentive" award, because "on the facts of this case" (none of which were set forth in the decision) he felt that the quality of representation was high, the litigation complex, the issues presented novel, and therefore the undertaking risky, and the outcome "of great benefit to a large class of needy people" (J.A. 358-359). The judgment awarding respondent's counsel $118,968 plus interest (J.A. 360) was filed on April 13, 1981.

Petitioner appealed the attorneys' fee award, and specifically urged the Court of Appeals to set concrete standards for such awards. On October 19, 1981, the Second Circuit Court of Appeals, in a summary unpublished opinion again rendered pursuant to § 0.23 of the Rules of the Second Circuit (J.A. 363-365),* affirmed the district court's

* The use by the court below of Local Rule 0.23 in issuing an unpublished opinion affirming the award of attorney's fees in this case was challenged by petitioner as one of the issues in its petition for certiorari. We contended that its use by the Court of Appeals here was an improper evasion of that Court's supervisory responsibility to provide needed standards in the unsettled area of attorney's fee awards. However, in light of the subsequent decision by a panel of the Second Circuit Court of Appeals in *New York State Ass'n for Retarded Children, Inc.* v. *Carey*, slip op. no. 484—August Term, 1982, p. 4563

(footnote continued on next page)

award of attorneys' fees in full. The Court of Appeals rejected petitioner's contentions that the hours allowed were duplicative and unreasonably high, stating simply that "having reviewed" the time records the district court judge "acted well within his discretion" in concluding that the 809.75* hours claimed did not represent duplicative or unnecessary efforts (J.A. 364). The Court of Appeals also rejected petitioner's assertion that the rates claimed (ranging from $95 per hour for one and a half years of experience to $105 per hour for five years of experience) were unreasonably high. Finally, the Court of Appeals affirmed the award of a 50% bonus for the reasons set forth in the district court opinion, providing no greater elucidation of the facts allegedly supporting those reasons than had been provided by the district court (J.A. 365).**

Summary of Argument

By this appeal, petitioner seeks clarification of the appropriate standards for determining attorney's fee awards under the Civil Rights Attorneys' Fees Awards Act of 1976 (42 U.S.C. § 1988). In recent years, few areas of the law have generated as much confusion and involved parties and the courts in more needless litigation.† Indeed, an

(2d Cir. June 15, 1983), *rehearing denied* (Aug. 2, 1983), which set forth guidelines for district courts to follow in the determination of attorney's fee applications, petitioner will not pursue the Rule 0.23 issue in this appeal.

* The total number of hours stated in the Court of Appeals' order (769.75) is incorrect due to the typographical error in the District Court's opinion. *See, ante,* p. 7 n.

** Subsequently, respondent's attorneys applied for and received an additional attorney's fee award of $16,419.80 for services performed in connection with petitioner's appeal of the initial fee award in this case. *Stenson* v. *Blum*, 78 Civ. 6044, opinion by *D.J.* SWEET, Sept. 14, 1982. In his opinion, District Judge Sweet awarded Arthur J. Fried a fee rate of $140.00 an hour and Ann Moynihan a fee rate of $125.00 an hour.

† *See* Berger, *Court Awarded Attorneys' Fees: What is "Reasonable"?* 126 U.Pa.L.Rev. 281, 283-293 (1977).

extensive 1980 study of attorney's fee awards in eleven Federal circuits revealed that not only are there major differences in the manner and standards by which such awards are determined among the circuits, but frequently there are major inconsistencies within the same court. See Miller, *Attorneys' Fees in Class Actions, A Report to the Federal Judicial Center* (1980), Ch. 3.

New York State strongly supports the laudable objectives underlying the Civil Rights Attorneys' Fees Awards Act of 1976 ("§ 1988") to encourage private enforcement of the civil rights laws barring invidious discrimination and protecting the poor and disadvantaged. In particular, the availability of "reasonable fees" to prevailing parties under § 1988 has helped non-profit public interest organizations, such as the Legal Aid Society of New York, play a major rule as "private attorneys general" in protecting the legal interests of the indigent in civil rights cases. Petitioner does not believe that such organizations should be deprived of reasonable attorney's fee awards simply because they receive government funding or exist to represent the poor. This is especially true in view of recent reduced levels of financial support from the Federal government for such organizations.

Petitioner is equally concerned, however, that the absence of uniform, equitable and workable standards for the award of attorney's fees under 42 U.S.C. § 1988 has resulted in major problems and abuses that, if allowed to continue, could kill the goose that laid the golden egg.

Definitive attorney's fees standards are essential:

—to ensure against egregious "windfall" awards, typified by the case at bar, explicitly prohibited by Congress;*

* Both House and Senate Reports which accompanied the Civil Rights Attorney's Fees Awards Act describe a reasonable attorney's fee as one which would be adequate to attract competent counsel without producing "windfalls" to attorneys. H. Rep. No. 1588, 94th Cong., 2d Sess. 9 (1976); S. Rep. No. 1011, 94th Cong., 2d Sess. 6 (1976).

—to reduce a tidal wave of § 1988 litigation that has clogged the courts and imposed tremendous burdens on the legal resources of local units of government;*

—to encourage settlements of attorney's fee issues consistent with this Court's mandates;

—to eliminate widespread disparities in awards among Circuits attributable to the lack of rational and uniform criteria;

—to strike a balance between the important objectives of the Act and the financial implications that exploding § 1988 litigation poses for hard-pressed units of local government and the taxpayers who ultimately must pay attorney's fee awards.**

The instant petition focuses on three principal abuses that have been repeatedly encountered in § 1988 litigation:

First, respondent's attorneys, salaried employees of a non-profit organization without any billing experience, asked for and received hourly rates higher than the billing rates charged by private law firms in the community for attorneys with similar years of experience. In granting these hourly rates without any consideration of the costs incurred by respondent's attorneys in the delivery of the legal services, the courts below ensured a windfall attorney's fee award.

The mechanistic application of an hourly rate purportedly "normally charged for similar work by attorneys of

* As noted by Judge Newman in *New York State Ass'n for Retarded Children, Inc.* v. *Carey, supra* at 4583 n.6, the headnotes to § 1988, most of which concern attorney's fee disputes, now fill 150 pages of West's Annotations. See 42 U.S.C.A. § 1988, at 155-305 (West 1981).

** The New York State Department of Law, for example, is currently defending more than 1500 actions brought against State employees under 42 U.S.C. § 1983. Since August 1, 1980, 111 attorney's fee awards have been paid by the State of New York under § 1988 based on § 1983 cases, not including attorney's fee applications that are still pending in litigation.

like skill in the area'"* is a fiction when applied to salaried attorneys of non-profit organizations who lack billing rate experience. It produces built-in windfalls by basing fees on rates charged by large law firms with far greater overheads and profit margins. In fact, even when applied to fee awards for private law firms undertaking public interest litigation, the market value standard has been criticized for encouraging inflated hourly rate claims antithetical to the "reasonable fee" mandate of the statute. See Wilkey, J., dissenting in *Copeland* v. *Marshall*, 641 F. 2d 880, 908-930 (D.C. Cir. 1980) (*en banc*).

The standard for setting hourly rates for § 1988 purposes, whether for private or non-profit attorneys, should relate in some measure to the attorneys' actual costs. This would provide a realistic anchor to protect against windfall awards, but would also be fully consistent with Congress' objective to see that "if those who violate the nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to *recover what it costs them* to vindicate these rights in court." (emphasis supplied). S. Rep. No. 1011, *supra*, at 2 (1976).

With respect to non-profit attorneys, petitioner specifically recommends the cost-related standards recently expounded by Judge Friendly of the Second Circuit Court of Appeals in *New York State Ass'n for Retarded Children, Inc.* v. *Carey*, *supra*.** Judge Friendly, in a concurring

* Commonly referred to as the "market value" or "lodestar" approach, fee awards under this formulation are calculated by multiplying the number of hours expended by the hourly rate normally charged for similar work by attorneys of like skill in the community. It is the approach that has been used by most courts in calculating hourly rates. See discussion, Point I, *infra*.

** For private law firms, petitioner also urges a cost-related standard for setting hourly rates based on actual salaries of attorneys working on a case, plus the firm's overhead and a reasonable profit component. *Copeland* v. *Marshall*, 594 F.2d 244, 251 (D.C. Cir. 1978). This standard would provide a consistent conceptual underpinning for *all* § 1988 fee applications designed to prevent unreasonable fee awards to both private firms and non-profit legal offices.

opinion, expressed preference for a standard that would fix the compensation of a non-profit organization by a rate that would reflect the hourly compensation paid to private attorneys in the same community with equivalent experience, plus the non-profit office's per-hour overhead. This approach would replace the fictitious hourly rate formulas that have typified fee applications under § 1988 with a realistic, cost-related standard.

The courts below magnified the windfall in this case by awarding respondent's counsel a 50% "bonus" for all work claimed by them in this litigation, resulting in exorbitant hourly rates of $142.50 to $157.50. When, as here, a multiplier is awarded to attorneys who have already received a "lodestar" based on the hourly rates of large private law firms with far higher costs of operations, a bonus of this magnitude is not only redundant, it is grossly excessive.

Factors which have influenced some courts to grant more modest bonuses in other cases—an extraordinarily difficult case, complex or novel legal issues, exemplary skill, risk of litigation—are simply not evident in this case. Thus, the allowance of any bonus in this case would send a message to district courts that prevailing parties may be regularly awarded bonuses in routine litigation and not only in rare and exceptional cases.*

Petitioner further submits that bonus awards are inappropriate in any § 1988 case; and, specifically, that they should be disavowed by this Court as windfalls unnecessary to attract competent counsel, and as grossly unfair to defendants, who in most cases must pay awards out of public funds.** Nothing in the statute or legislative history of 42 U.S.C. § 1988 expressly authorizes bonuses.

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* *Cf. Donnell* v. *United States*, 682 F. 2d 240, 254 (D.C. Cir. 1982).

** *Northcross* v. *Board of Education of the Memphis City Schools*, 611 F. 2d 624, 638 (6th Cir. 1979).

Moreover, the allowance of bonuses under a *fee-shifting* statute such as § 1988, where defendants (usually taxpayers) must foot the bill, is a misapplication of the historic principles that led this Court to approve bonus awards in antitrust and shareholder's derivative actions. In such cases, attorneys responsible for enriching or salvaging a common fund were given a larger portion of the fund than their normal billing rates might have warranted.

A final factor contributing to the windfall in this case was the summary acceptance by the courts below of the 810 hours requested by respondent's counsel without any requirement that they (i) identify and substantiate claimed hours unsupported by contemporaneous time records or (ii) explain how work was divided for more than 500 hours of facially duplicative tasks. Because the fee application failed to document fully the hours claimed or to explain how respondent's attorneys' services were divided, the district court abused is discretion by not reducing the fee award to reflect the undocumented and potentially duplicative hours claimed.

ARGUMENT

POINT I

The bloated attorney's fees awarded by the courts below resulted, in part, from excessive hourly rates derived from billing rates of private law firms having no relation to the costs of respondent's attorneys.

The excessive hourly rates used to calculate the base fee award (lodestar)* for respondent's three attorneys—$95, $100, and $105—were a major cause of the exorbitant attor-

* This base award, in turn, was increased by a 50% bonus, which translates into overall hourly remuneration rates of $142.50, $150.00, and $157.50, respectively.

ney's fee award sanctioned by the courts below. Such hourly rates, representing the "highest opportunity costs" of attorneys with equivalent experience in the private sector, should be rejected by this Court as the foundation for calculating reasonable fees under 42 U.S.C. 1988.* Hourly rates for prevailing attorneys should bear at least some relationship to those attorneys' actual costs if windfalls are to be avoided.

A. Application of the so-called "market value" or "lodestar" standard produced a windfall attorneys' fee award.

Although the Civil Rights Attorneys' Fee Award Act of 1976, 42 U.S.C. § 1988, authorizes the prevailing party in actions subject to its coverage to receive a "reasonable attorney's fee," the Act provides no standards for determining "reasonableness." Both the Senate and House Reports supporting the legislation that became § 1988 caution against fee awards that "produce windfalls to attorneys." S. Rep. No. 94-1011, 94th Cong. 2d Sess. (June 29, 1976) at p. 6; H. Rep. No. 94-1558, 94th Cong. 2d Sess. (Sept. 15, 1976) at p. 8. But the only guidance provided in these Reports to assist in the calculation of a reasonable fee is their approval of factors set forth in *Johnson* v. *Georgia Highway Express, Inc.*, 488 F. 2d 714 (5th Cir. 1974).** *See* S.

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* *Copeland* v. *Marshall*, 641 F. 2d, 880, 920 (dissenting opinion of Judge Wilkey); *National Council of Comm. Mental Health Centers, Inc.* v. *Weinberger*, 387 F. Supp. 991, 997 (D.D.C. 1974)

** The twelve factors set forth in *Johnson* v. *Georgia Highway Express, Inc., supra* at 717-19 are: 1) the time and labor required, 2) the novelty and difficulty of the questions, 3) the skill required to perform the legal service properly, 4) the preclusion of other employment by the attorney due to acceptance of the case, 5) the customary fee, 6) whether the fee is fixed or contingent, 7) time limitations imposed by the client or other circumstances, 8) the amount involved and the results obtained, 9) the experience, reputation, and ability of the attorneys, 10) the "undesirability" of the case, 11) the nature and length of professional relationship with the client, and 12) awards in similar cases.

Rep., *supra* at p. 6; H. Rep. *supra* at pp. 8-9. The *Johnson* factors, however, are imprecise, redundant and provide no analytical framework for calculating a reasonable fee. As the Sixth Circuit recognized in *Northcross* v. *Board of Education of Memphis City Schools*, 611 F. 2d 624, 642 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980):

> "We have learned through experience, however, that merely providing a check list of factors to consider does not lead to consistent results, or, in many cases, reasonable fees. Many of the factors are overlapping, and there is no guidance as to the relative importance of each factor, or, indeed, how they are to be applied in a given case."*

Moreover, many courts have erroneously shaped the *Johnson* factors into a subjective rate-setting methodology inherently incapable of producing "reasonable fee" awards in most cases. The fee award in the instant case—based on hourly rates higher than those billed by large Wall Street firms—is a typical rather than an isolated example of the disparate and inflated fees caused by the inadequate "market value" approach.**

This imprecision should not be surprising because the factors set forth in *Johnson* were not meant to establish a new fee setting mechanism. The *Johnson* court itself in-

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* See also *Copeland* v. *Marshall*, 641 F. 2d 880, 890 (D.C. Cir. 1980) (*en banc*), where the court found that most district judges merely apply lip service to the *Johnson* factors, which are imprecise, overlap considerably and fail to "conjure up a reasonable dollar figure in the mind of a district court judge."

** A survey of civil rights cases decided between 1974 and 1979 shows that the rate of compensation awarded civil rights attorneys unexplainably varied by 685%. Comment, *Calculation of a Reasonable Award of Attorneys' Fees under the Attorneys' Fee Award Act of 1976*, 13 John Marshall L. Rev. 331, 378-82 (1980); Berger, *Court Awarded Attorneys' Fees: What is 'Reasonable'?*, U. Pa. L. Rev. 281, 286-87 (1977).

dicated that the factors were nothing more than those set forth in the American Bar Association's Code of Professional Responsibility, Ethical Consideration 2-18 ("EC 2-18") and Disciplinary Rule 2-106 ("DR 2-106"). *Johnson, supra* at 719. The stated purpose of DR 2-106, which lists ten of the factors adopted in *Johnson*, is not to promulgate a formula for calculating a reasonable fee, but rather to provide guidelines for an attorney to use in determining whether the fee he or she has already calculated is excessive in a given case.* Thus, the initial fee calculation to be reviewed under the standards of DR 2-106, and consequently under *Johnson*, should be based in part—as is the fee for any service—on the cost of providing that service plus, where appropriate, a margin for profit.** *New York State Ass'n for Retarded Children* v. *Carey, supra* at 4589. Rather than introducing a new formula for calculating fees, the *Johnson* court merely emphasized that existing standards for determining the reasonableness of a cost-related fee are as applicable to the court's determination of reasonableness in statutory fee-setting as they are to an attorney's determination of reasonableness in cases where the fee is to be paid by a client.

Most courts, including the courts below, have applied a so-called "lodestar" or "market value" standard in attempting to apply the *Johnson* factors.† This standard,

* EC 2-18, which incorporates DR 2-106, is to the same effect.

** The recognition of a margin for profit in a "reasonable fee" under DR 2-106 and EC 2-18 make several of the *Johnson* factors unworkable if applied to fee applications by attorneys employed by nonprofit organizations; in particular, factors (#4) the preclusion of employment by the attorney due to acceptance of the case, (#5) the customary fee, (#6) whether the fee is fixed or contingent, (#7) time limitations imposed by the client, (#10) the "undesirability" of the case, and (#11) the nature and length of the professional relationship with the client.

† *See* Larson, *Federal Court Awards of Attorney's Fees*, pp. 122-27 (1981); Miller, *Attorney's Fees in Class Actions—A Report to the Federal Judicial Center*, Ch. 3 (1980).

borrowed from the antitrust attorney's fee award decisions in *Lindy Bros. Builders, Inc.* v. *American Radiator & Standard Sanitary Corp.*, 540 F. 2d 102 (3d Cir. 1976) ["*Lindy II*"] and *City of Detroit* v. *Grinnell Corp.*, 560 F. 2d 1093 (2d Cir. 1977) ["*Grinnell II*"], requires district courts to multiply the number of hours expended by each attorney involved in each type of work on the case by the hourly billing rate normally charged for similar work by attorneys of like skill in the area. After this base or "lodestar" rate is established, "other less objective factors, such as the 'risk of litigation,' the complexity of the issues, and the skill of the attorneys are introduced to determine a final fee amount," *Grinnell II*, 560 F. 2d at 1098, although "the courts must be mindful that an attorney will receive an otherwise reasonable compensation for his time from the lodestar figure alone." *Id.* at 1099.*

The immediately apparent error of the market value standard is that it exalts "the rate normally charged for similar work by attorneys of like skill in the area" (*Johnson* factor #5; DR 2-106 factor #3) over all other factors and ignores the fact that the rate charged by any law firm depends in large part upon the firm's costs. Moreover, the "rate normally charged" is virtually incapable of objective evaluation, and its predominance in the "market value" approach therefore ensures that the determination of a reasonable fee will be all but impossible.** Nor is the fee cus-

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* The history and derivation of this standard is fully discussed in Point II, *infra*.

** Information concerning the "rate normally charged" is typically presented to the courts in conclusory "information and belief" affidavits which, as noted in *National Ass'n of Concerned Veterans* v. *Secretary of Defense*, 675 F. 2d 1319, 1332 (D.C. Cir. 1982), are of no evidentiary value to the district court in setting a proper rate. Significantly, respondent's counsel here submitted no information whatsoever to justify the exorbitant rates they requested and were awarded.

tomarily charged in the locality a major factor in setting market rates.*

Additional flaws in the "market value" standard are exposed in Judge Wilkey's dissent in *Copeland* v. *Marshall, supra* at 917-21. First, under the "market value" standard, the "lodestar" figure often marks the point of departure for further adjustment even though most of the factors on which that adjustment is based *are already included* in the "lodestar" itself. *See also New York State Ass'n for Retarded Children* v. *Carey, supra* at 4601 n. 2 (Friendly, J., concurring). Thus, almost all upward adjustments to the "lodestar" will provide duplicative compensation for those factors, inevitably creating the "windfall" prohibited by § 1988. *See* S. Rep. 94-1011, *supra at* p. 6; H. Rep. No. 94-1558, *supra* at p. 9.

Second, the "market value" approach is inherently unworkable because there is no true "market" for the services compensated under § 1988, and therefore no market forces exist to restrict or set "reasonable" attorney's fees. *Copeland* v. *Marshall, supra* at 909, 913. Indeed, the very purpose of § 1988 is to create such a "market" by encouraging attorneys to bring unpopular, non-remunerative civil rights actions.

Third, application of a private sector "market rate" in § 1988 litigation ignores the fact that both private and nonprofit attorneys are essentially performing government legal work as private attorneys general when they engage in Section 1983 lawsuits. Moreover, the government must pay

* In a survey discussed in Steele and Rothe, *Pricing Behavior of Attorneys,* 42 Texas Bar Journal 285, 292 (1979), fewer than half of the attorneys responding knew what their competitors fees were. Not surprisingly, when those same attorneys were questioned concerning which of the DR 2-106 factors they found most helpful in setting fees, only 21 percent found the "fee customarily charged in the locality" to be very useful. *Id.* at 289.

for the defense of these cases by the public attorney general. To the extent that any market or environment can be said to exist as a frame of reference for setting § 1988 fees, it should be the universe of government legal work where costs and fees are usually considerably lower than fees in the private market; consequently, reasonable attorney's fees should have some relationship to the usual compensation for government service. *Copeland* v. *Marshall, supra* at 912-13.*

Inherent flaws in the "market value" standard are further magnified when, as here, it is used to invent a billing rate for an attorney employed by a non-profit organization which does not bill its clients. As emphasized in *New York State Ass'n for Retarded Children* v. *Carey, supra* at 4589, the billing rate of a private firm is typically comprised of three components: compensation of the billing attorney, a share of the firm's overhead, and some profit for the firm. Both the compensation paid to the billing attorney** and the

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* See also *Johnson* v. *Georgia Highway Express, supra* at 719 ("the Section should not be implemented in such a way as to ridicule the public attorney general").

** "Private firms in New York City usually pay their associates more than attorneys earn in non-profit law offices." *New York State Ass'n for Retarded Children* v. *Carey, supra* at 4580. Nonetheless, the hourly rates awarded to public interest attorneys often, as in the instant case, exceed the billing rates charged by large Wall Street firms—with rates higher than those of the average attorney in the community—for attorneys with equivalent years of experience. For example, in *New York State Ass'n for Retarded Children* v. *Carey, supra* at 4585 n. 7, the record revealed that the billing rates for associates at Cravath, Swaine & Moore in 1979-80 ranged from $65 an hour for one year of experience to $105 an hour for a senior associate with eight years of experience. Yet, the district court in that case had awarded hourly rates to non-profit attorneys with equivalent experience for the same period of time ranging from $100 to $140 per hour, an amount held by the Second Circuit to be a windfall unauthorized by § 1988.

cost of the private firm's overhead* are typically much greater than the comparative costs of the non-profit office, and the profit component is not a factor at all in a "reasonable" fee for a non-profit firm. *Id.* at 4589-90. Thus, to base the compensation of attorneys in non-profit offices on the hourly rates normally billed by private attorneys of similar skill and experience is *ipso facto* "so inordinately generous as to be unreasonable." *Id.* at 4590.

The instant case provides a perfect example of the inevitable windfall which results from application of the "market value" standard to set the fee for a non-profit office. The hourly base rates awarded of $95, $100, and $105 for attorneys with three to five years experience (at the time of the fee application (J.A. 355)) are significantly higher than those charged by the Wall Street firm of Cravath, Swaine & Moore for the work of attorneys with similar years of experience. See *New York State Ass'n for Retarded Children* v. *Carey, supra* at 4585 n. 7.

B. A cost-related standard for determining hourly rates is required to satisfy the objectives of the statute.

Petitioner urges this Court to adopt a cost-related standard for attorney's fee awards under § 1988 because any fee-setting approach which ignores the costs of delivering legal services is likely to produce a windfall.

A number of courts have already applied a cost analysis in setting fees. *See, e.g., Glover* v. *Johnson,* 531 F. Supp. 1036 (S.D. Mich. 1982); *Page* v. *Priesser,* 468 F. Supp. 399, 403 (S.D. Iowa 1979); *Alsager* v. *District Court of Polk*

* Large private firms usually "incur overhead expenses far higher than those of non-profit firms. They pay premium rents, and they maintain the personnel and other resources necessary to provide the extensive legal services and quantity of documents required on short notice in connection with corporate and securities practices." *New York State Ass'n for Retarded Children* v. *Carey, supra* at 4589.

County, 447 F. Supp. 572 (S. D. Iowa 1977).* In *Copeland* v. *Marshall*, 594 F. 2d 244 (D.C. Cir. 1978), the court initially adopted a "cost-plus" standard for the award of attorney's fees. The court recognized that consideration of the cost of engaging in litigation is "at the heart of the firm's own accounting process as a business concern." *Id.* at 251. However, upon reconsideration and rehearing *en banc*, a majority of the District of Columbia Circuit in *Copeland*, after expressing the "fear that the proposed 'cost-plus' method of calculating fees would become the inquiry of 'massive proportions' that we strive to avoid," adopted a market value standard for setting hourly rates. 641 F. 2d 880, 896 (D.C. Cir. 1980). Judge Wilkey noted in dissent that a cost-related formula is clearly consistent with the Congressional purpose of attracting competent counsel while avoiding windfalls to attorneys, and would not be difficult to apply. He properly cautioned that the majority's adherence to a market value standard would have the effect of inflating fee awards "Up, Up and Away!" 641 F. 2d at 908.

Recently, the Second Circuit Court of Appeals in *New York State Ass'n for Retarded Children* v. *Carey*, *supra*, in reversing a $1,406,751.39 fee award to public interest attorneys who had succeeded in obtaining a consent decree in the Willowbrook litigation, underscored the importance of a cost reference in the determination of hourly rates.

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* In *Glover* v. *Johnson*, *supra* at 1040, the court noted that because "legal services attorneys, and by analogy, other public interest lawyers, do not have a normal billing rate since there is no 'market' for their skills," a preferable alternative to the market value standard "is to begin with the time spent by the attorney and calculate the proportionate amount of cost to the public interest law group of providing her services for the litigation." *Id.* at 1043. The court developed a formula by which per capita overhead costs and the attorney's salary would be factored into an hourly fee which would "not provide a windfall while complying with the purpose and intent of the Attorneys' Fees Act." *Id.* at 1044.

The majority opinion of Judge Newman initially acknowledged the attractiveness of several cost-based approaches to fee setting but rejected them because of the Second Circuit's precedents and concern about the burden of cost-accounting disputes.* However, the court directed that:

> "Attorney's fees awarded to non-profit law office should be calculated at billing rates of private attorneys of comparable skill and experience, *subject to a maximum 'break point' rate* to be selected by the district judge in each case at the point above which private billing rates include such a significant profit component and an overhead cost so significantly above that of non-profit law offices that use of such rates would produce a windfall for such offices." *Id.* at 4599 (Emphasis supplied).

Based upon its knowledge of 1980 billing rates in New York City, the court established the "break point" for services rendered by attorneys from the Legal Aid Society and New York Civil Liberties Union in 1978 and thereafter as no higher than $75 per hour, unless those law offices could prove that a higher rate was necessary to secure their reimbursement of costs.

Judge Friendly's concurring opinion in *New York Ass'n for Retarded Children* v. *Carey, supra* at 4600-01, while accepting Judge Newman's "break point" approach, expressed his preference for a standard that would fix the compensation of a non-profit organization by a rate reflecting the hourly compensation paid to private attorneys in

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* *Id.* at 4590-92. One "modified cost-approach" considered by Judge Newman is similar in concept to the cost-based approach advocated by Judge Friendly in his concurring opinion. It would "combine the non-profit office's per-hour overhead cost with the value of an hour of an attorney's time, the latter component to be derived from the salary an attorney of comparable skill and experience is paid by a private law firm. *New York State Ass'n for Retarded Children* v. *Carey, supra* at 28-29.

the same community with equivalent experience, plus the non-profit office's per-hour overhead costs attributable to its attorneys. Judge Friendly maintained that such an approach would be consistent with the intent of Congress, as expressed in the Senate and House Reports, and avoid the imposition on financially hard-pressed units of state and local government of windfalls that occur when rates required to cover overhead required for the business of a large private firm, plus a profit element, are used to determine fees for non-profit offices. Judge Friendly further concluded that the "difficulties supposed to inhere in the calculation of the overhead factor are imaginary", noting that "[t]he non-profit law office must keep records of its overhead and of the number and salaries of its attorneys for a variety of other purposes" such that costs could be calculated by "any reasonable method of allocation, e.g. a weighted dollar-hour basis." *Id.* at 4601.*

Both the "break-point" approach adopted by the Second Circuit or the modified cost approach advocated by Judge Friendly require at least some consideration of a prevailing attorney's costs in setting an appropriate hourly rate under § 1988. Judge Newman's approach provides a cost-related *ceiling* while Judge Friendly proposes a *floor* that reflects actual overhead costs. Both approaches acknowledge that the district court must be cognizant of a law firm's overhead costs to protect against windfall fee awards. Both standards would properly limit grossly excessive awards caused by the application of the fictional market value standard.

Because petitioner believes that a modified cost-based standard, as proposed by Judge Friendly, would be simple to implement and best conform to the purpose of § 1988 to award "reasonable fees," we propose the adoption of such a standard by this Court for all attorney's fees applications.

* See also *Copeland* v. *Marshall, supra* at 927 (dissenting opinion of Judge Wilkey).

First, the difficulties which supposedly adhere to calculation of the overhead factors under a cost-based standard were accurately described as "imaginary" by Judge Friendly in *New York State Ass'n for Retarded Children* v. *Carey, supra* at 4600-01. As Judge Wilkey noted in his dissent in *Copeland* v. *Marshall, supra* at 926, a firm knows its overhead costs, at least annually, or it is not computing its income taxes correctly. If the office is well managed, it should know its costs quarterly or even monthly. Moreover, non-profit organizations funded under the Legal Services Corporation Act are required to submit comprehensive financial information regarding their financial operations as a condition to their receipt of federal funding. *See* 42 U.S.C. § 2996h(c)(1) and 45 C.F.R. § 1602.

Second, the salary component of any cost-related formula is readily ascertainable. In the case of private attorneys, their salaries simply need to be divided by billable hours to yield average hourly compensation. While salaries of non-profit attorneys conceivably could be used in a like manner, under Judge Friendly's formulation in *New York State Ass'n for Retarded Children* v. *Carey, supra* at 4600, that component for non-profit firms would be based on the average salary of private attorneys with the same level of experience divided by the average billable hours of private attorneys with the same level of experience.* Thus, under

* One attractive feature of this approach, as distinct from the use of actual salaries of non-profit attorneys, is that it places a realistic valuation on an attorney's time. As stated by Judge Newman, *supra* at 4591, "By using the value of the non-profit attorney's time instead of the cost of that time to his employer, it would produce a fee reflecting the costs the non-profit office would likely have incurred to hire the attorney were it not for budgetary limitations." Moreover, the use of actual salaries paid to attorneys employed by non-profit firms would make the calculation of the hourly salary component more difficult because that determination depends in part on the number of billable hours attributable to each attorney, and non-profit firms do not bill their clients. Although the average number of

(footnote continued on next page)

petitioner's proposed standard, the same conceptual method would be used to set hourly rates for profit-making firms and non-profit offices, with the addition of a modest profit component for private firms based, in part, on the relevant *Johnson* factors.

Third, a cost-related standard would effectuate the intent of Congress in enacting § 1988 that reasonable fees be provided to attorneys prevailing in civil rights litigation. Nothing in the language of § 1988, or in its legislative history, precludes the adoption of a formula which would reimburse attorneys for their actual costs plus, in the case of a private firm, a reasonable profit to encourage pursuit of public interest litigation. *Alsager* v. *District Court, supra* at 577; *Comment: Calculation of a Reasonable Award of Attorneys' Fees Under the Attorneys' Fees Award Act of 1976*, 13 John Marshall L. Rev. 331, 390-98 (1980). Indeed, language in the Senate Report, S. Rep. 94-1011, *supra* at p. 2, supports the application of a cost-related standard:

> "If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity *to recover what it costs them* to vindicate those rights in court. (Emphasis supplied).

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billable hours of private attorneys with like experience could be applied to the actual salary paid to non-profit attorneys, such application would result in a less than reasonable rate for the non-profit firms, whose lower salaries would yield a small hourly rate if divided by the large number of hours billed by associates at private law firms. See "Why the Big Must Get Bigger," The New York Times, Jan. 16, 1983, Business Section, p. 10 col. 1-2. In order to ensure uniformity and accuracy in determining the average salary and billable hours of private attorneys to be applied to non-profit law firms under petitioner's proposed standard, each circuit or district court could promulgate schedules of average salaries (based on years of experience) in the community, as well as schedules of related average billable hours.

Although the legislative history of § 1988 does not expressly discuss the rate of compensation appropriate for not-for-profit lawyers, both S. Rep. 94-1011, *supra* at p. 6 and H. Rep. 94-1558, *supra* at p. 9, contain admonitions that fee awards should not produce "windfalls" to any attorneys. Thus, a formula based at least in part on the recovery of costs—rather than reliance on hourly billing rates with built-in profit components—is consistent with Congress' intent to authorize non-profit attorneys fees in civil rights litigation while avoiding windfalls.*

By awarding non-profit firms acting as private attorneys general fees equivalent to the reasonable value of their attorney's time plus overhead costs, the economic burden of civil rights litigation is fairly placed on the government. To award non-profit firms more, when neither they nor the opposing public attorney general is in business to make a profit, would indeed make the non-profit firm's position so lucrative as to ridicule its governmental adversary. See *Johnson* v. *Georgia Highway Express, supra* at 719.

A cost-related standard would also give due recognition to the factors set forth by the *Johnson* court. Two of the *Johnson* factors (the skill required to perform the legal services properly [#3], and the experience, reputation and ability of the attorney [#9]) are reflected in the salary component of a cost-based rate. Three additional factors (the time and labor required [# 1], the novelty and difficulty of the questions [#2], and preclusion of other employment [#4]), are directly related to the number of hours reason-

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* In *New York State Ass'n for Retarded Children* v. *Carey, supra* at 4587, Judge Newman correctly observed that the fact that Congress intended fees awarded in civil rights cases under § 1988 to be equivalent to those awarded in other types of equally complex federal litigation does not necessarily imply that equivalent fees should be awarded to profit-making and non-profit attorneys.

ably expended, *Northcross* v. *Board of Education, supra* at 642-43, and similarly would be included in a cost-based standard.

The remaining *Johnson* factors affecting only the profit component of a cost-related rate would be applied to private law firms.*

Reimbursing non-profit firms in the manner proposed would ensure sufficient compensation to satisfy the core objective of Section 1988 to give attorneys an incentive to represent civil rights plaintiffs. The fact that non-profit organizations, such as the Legal Aid Society, receive no compensation at all in cases for which statutory fee awards are unavailable in itself makes fee-producing civil rights cases, with their promise of an attorney's fee award, extremely attractive. Further, non-profit organizations commendably do not require the same incentive as do profit-making firms to undertake civil rights litigation. Many of these organizations exist for the very purpose of seeking redress of civil rights violations, and ably pursued that objective prior to the enactment of § 1988.

Petitioners submit that a cost-related standard provides the most objective, reasonable and predictable means of complying with the purposes and constraints of § 1988. However, should this Court conclude that the cost calcula-

* Because the rates awarded to non-profit offices under petitioner's proposed standard would not contain a profit component, the remaining *Johnson* factors are inapplicable to those fee awards. Under petitioner's proposed standard, the profit component initially proposed by a profit-making firm, when added to the cost component, would usually result in rates comparable to those charged for other litigation services. This fee would provide more than sufficient incentive for private firms to pursue civil rights litigation. One of the myths of Section 1988 is that private firms must be able to obtain their full market rates to undertake civil rights cases against government. In fact, for many private firms, it is likely that reimbursement for attorney's time plus overhead is more than enough of an incentive. *McCann* v. *Coughlin*, 698 F.2d 112, 130 (2d Cir. 1983).

tions required would impose too great a burden on the district courts, a simpler, albeit less exact formulation, is that advocated by Judge Newman, *supra* at p. 23. Yet another cost-related approach would be for the district courts to set hourly rates based on promulgated schedules of estimated average hourly salaries of private attorneys, based on years of experience, *and* average hourly overhead costs.* This method would still recognize the primacy of cost factors in fee-setting and avoid windfall awards while avoiding the necessity of a case-by-case cost calculation.**

POINT II

The award of a 50% "bonus" to respondent's attorneys grossly escalated their hourly rates and constituted a blatant windfall prohibited by 42 U.S.C. § 1988.

A. The award of a bonus in this case was totally unwarranted.

The 50% "bonus" awarded by the district court (J.A. 358) and approved by the Court of Appeals (J.A. 365) exemplifies the unreasonable fee awards which inevitably re-

* The number of schedules promulgated would depend on the variations in costs among different areas. If the variation between the overhead costs of profit-making and non-profit firms proved so great that it would be unreasonable to use the same schedules for both, additional schedules could be promulgated to reflect such differences.

** Yet another theoretical option would be the use of the fixed-rate standard adopted by Congress in the Equal Access to Justice Act, Pub. L. No. 96-481 (1980), amending 5 U.S.C. § 504 and 28 U.S.C. § 2412. The Equal Access to Justice Act imposes a maximum rate of $75.00 per hour for work done in 1981 and thereafter (subject to cost of living increases and special factors) in order to compensate defendants whom the government has sued without basis. Although a fixed rate standard unquestionably would preclude excessive hourly rates and be easier to apply than other cost-based alternatives, absent Congressional action, it has no relation to appropriate compensation for attorneys serving in Civil Rights Act cases. *New York State Ass'n for Retarded Children* v. *Carey*, *supra* at 4603 (concurring opinion of Judge Wyzanski).

sult from the application of the *Johnson* factors as a self-contained fee-setting mechanism. The granting of that "bonus" had the effect of raising the hourly rates awarded to respondent's attorneys for work performed between 1978 and 1981 to $142.50 for an attorney with one and one-half years of experience to $157.50 for an attorney with four years of experience when the base rates to which that "bonus" was added ($95-$105 per hour) already exceeded the billing rates of the largest Wall Street law firms for attorneys of comparable experience. *See New York State Ass'n for Retarded Children* v. *Carey, supra* at 4585 n.7. This unconscionable result constitutes a blatant disregard of Congress' admonition against windfalls. Even if this Court should determine that some upward adjustment of the lodestar is permissible under § 1988 (which petitioner disputes), no bonus was warranted in this case.

The 50% bonus was granted by the district court upon its summary conclusion that the quality of representation, the complexity and novelty of the issues, the risk involved and the outcome justified such an "incentive award" (J.A. 358). The court's summary listing of these factors without specific factual support was, in itself, insufficient to warrant any increase in the lodestar amount. *Grinnell II, supra* at 110; *International Travel Arrangers, Inc.* v. *Western Airlines, Inc.*, 623 F.2d 1255, 1276 (9th Cir.), *cert. denied*, 440 U.S. 1063 (1980); *Northcross* v. *Board of Education, supra* at 636. Moreover, to the extent that any of these factors may have been present, they were already taken into account when the district court approved all of the hours and high hourly rates requested by respondent's attorneys in calculating the lodestar. Even if these factors may properly be applied to increase attorney's fee awards in some cases, their application here was a patent abuse of discretion.

Nothing in the record of this case justifies the conclusion that the issues were especially complex or novel or that the

quality of representation was extraordinary.* The "complexity" of this case cannot bear comparison with the complexity of the cases cited by the district court in support of the bonus award (J.A. 358-59).** Because the facts were not in dispute, the case was decided on a motion for summary judgment after discovery limited to the service of brief interrogatories upon the defendants. No discovery was taken of the plaintiff or intervenors, and no trial was necessary.

The legal issue presented—the rights of public benefit recipients to a hearing before termination of their benefits—was an important but relatively routine issue governed by the litany of cases following this Court's decision in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), and could not be considered complex by any attorney with welfare law experience. Indeed, plaintiff argued that the relief sought was required by *Goldberg* v. *Kelly* and mandated by Federal regulations (Plaintiff and Plaintiff/Intervenor's Brief in Support of their Motions for Summary Judgments, pp. 9-11, 23), and the district court's opinion found it unnecessary to look beyond the Federal regulations (J.A. 153). Indeed, the lack of authority for a bonus award here based on "com-

* Even under the justification for contingency bonuses found in cases such as *Lindy* and *Grinnell*, upward adjustments of the lodestar amount are reserved for "exceptional services only" (*Lindy II*, *supra* at 118), such as in a case involving "a long and complicated trial" (*Grinnell II*, *supra* at 1101).

** *Population Services Int'l* v. *Carey*, 476 F. Supp. 4 (S.D.N.Y. 1979), involved issues of standing, the constitutional rights of minors, First Amendment interests in advertising, and the right to privacy, the complexity of which was "reflected in the fact that the Supreme Court justices filed five separate opinions." *Id.* at 11. *City of New York* v. *Darling-Delaware*, 440 F. Supp. 1132 (S.D.N.Y. 1977), was an antitrust action which required seven years of difficult litigation including five years to establish a class. *Blank* v. *Talley Industries, Inc.*, 390 F. Supp. 1 (S.D.N.Y. 1975), also cited by the district court, was a highly complex securities fraud case involving 10,900 hours of plaintiff's lawyers' time and a $10,000,000 benefit to the shareholders class.

plexity" is underscored when the record of this case here is compared to other cases where the Second Circuit Court of Appeals has *reversed* the granting of such bonus awards.*

The award of a bonus to respondent's attorneys because the "quality of representation was high" (J.A. 358) is similarly unwarranted. That factor, like the complexity of the case, is already incorporated into the lodestar determination. The very award of attorney's fees under § 1988 compensates the attorneys of prevailing parties for the quality of their services; "the skill of plaintiffs' counsel is already reflected in the billing rate." *Population Services International* v. *Carey*, 476 F. Supp. 4, 12 (S.D.N.Y. 1979). The practice of routinely augmenting fee awards for quality has properly been condemned by the District of Columbia Court of Appeals in *National Ass'n of Concerned Veterans* v. *Secretary of Defense*, 675 F.2d 1319, 1329 (D.C. Cir. 1982), and in *Donnell* v. *United States*, 682 F.2d 240, 254 (D.C. Cir. 1982). In *Donnell*, the Circuit Court observed:

* In *Beazer* v. *New York City Transit Authority*, 558 F.2d 97 (2d Cir. 1977), *rev'd on other grounds*, 440 U.S. 568 (1979), the Circuit Court modified a district court order to exclude a $50,710 "premium" award to attorneys who had successfully prosecuted a class action that had enjoined the Transit Authority's refusal to employ former heroin addicts who had completed methadone maintenance programs. The plaintiff's attorneys had participated in a 15-day trial during which they presented extensive scientific testimony in a novel area of law. Even though the court recognized that "complex factual issues were involved, the proof of which required diligent and rather prodigious effort," it concluded that the legal issues involved were not of a sufficient complexity to warrant any premium. 558 F.2d at 100. The landmark *Grinnell* litigation, a complex antitrust case, also rejected a bonus award. The district court there awarded plaintiffs' attorneys a "lodestar" figure of $352,765, but doubled and tripled the fees awarded for various types of legal work and awarded a total of $870,609 in attorney's fees. In *Grinnell II*, *supra*, 560 F.2d at 1099, the court rejected any increase in the lodestar award which the court found alone provided the attorneys with fair and reasonable compensation. If the complexity of *Beazer* and *Grinnell* failed to warrant a bonus, the routine nature of this case certainly does not justify such an award.

"... We have found it all too common for the district courts to adjust the lodestar upward to reflect what the courts view as a high level of quality of representation. This trend should stop. *Copeland* contemplated such adjustments only for rare cases: 'A quality adjustment is appropriate only when the representation is unusually good or bad, *taking into account the level of skill normally expected* of an attorney commanding the hourly rates used to compute the "lodestar".'" 682 F.2d at 254. (Footnote omitted)

Nor can the "risk of litigation" justify the award of a bonus in this case. While private sector attorneys might insist on contingent fees and premium rates when they bring litigation that could entail years of work without the certainty of success, all of respondent's attorneys here were salaried and working on precisely the type of case for which they were hired. Thus, there was no "risk" of the abandonment of fee-generating cases which warranted a contingency bonus when plaintiff's attorneys pursued this civil rights action.

The Second Circuit Court of Appeals of *New York State Ass'n for Retarded Children, Inc.* v. *Carey, supra,* recently joined other courts that have found it unreasonable to add contingency bonuses to fee awards for non-profit law offices. As Circuit Judge Newman stated in his opinion:

"... Although a component of a bonus for risk of failure may be appropriate in some cases to entice private firms to undertake difficult cases in which victory is uncertain, we believe that the promise of such rewards is not needed to induce non-profit organizations like the Legal Aid Society and the Civil Liberties Union to take on such cases. These organizations exist to represent groups like the Willowbrook class, with constitutional claims at the cutting edge of the law. We join those courts that have found it unreasonable to add

contingency bonuses to fee awards for non-profit law offices. *See McManama* v. *Lukhard*, 464 F. Supp. 38, 43 (W.D. Va. 1978), *aff'd*, 616 F.2d 727 (4th Cir. 1980); *Cole* v. *Tuttle*, 462 F.Supp. 1016, 1019 (N.D. Miss. 1978); *McCormick* v. *Attala County Board of Education*, 424 F. Supp. 1382, 1388 (N.D. Miss. 1976)." Slip op. at 4598.

As an additional basis for its bonus award, the district court concluded that the outcome of the litigation resulted in a "great benefit to a large class of needy people."* (J.A. 358). However, unlike stockholders' derivative actions, where a common fund for the benefit of class members is created from which plaintiffs' attorneys may be compensated, it is not the class—but the taxpayers—that must pay the bonus award here. And, if every victory for a plaintiff in a class action could be said to entitle plaintiff's counsel to a bonus, such awards would never be limited to exceptional or extraordinary cases.

A 50% bonus which must be paid by the state's taxpayers on behalf of the defendant State officer could also be seen as an impermissible award of punitive damages. This is particularly true because the "lodestar" amount already constitutes reasonable compensation. In this respect, the opinion of this Court in *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981), which held that punitive damages may not be awarded against a municipality in a § 1983 action, is pertinent. In recognizing the effect that such awards have upon innocent taxpayers, this Court observed, *id.* at 267:

"[P]unitive damages imposed on a municipality are in effect a windfall to a fully compensated plaintiff,

* In fact, a June, 1981 survey by the New York State Department of Social Services found that fewer than 1% of the 129,258 persons who received notices of their right to a hearing pursuant to the district court's order had not applied for medicaid benefits for which they were currently eligible subsequent to their SSI termination.

and are likely accompanied by an increase in taxes or a reduction in public services for the citizens footing the bill. Neither reason nor justice suggests that such retribution should be visited on the shoulders of blameless or unknowing taxpayers." (footnote omitted).

Indeed, a number of courts have rejected the award of a bonus augmenting an attorney's fee award which falls upon the shoulders of blameless taxpayers. See *Northcross* v. *Board of Education, supra* at 638; *Chastang* v. *Flynn Emrech Co.*, 541 F.2d 1040, 1045 (4th Cir. 1976); *Keyes* v. *School District No. 1, Denver, Colo.*, 439 F. Supp. 393, 414 (D. Colo. 1977); *Rios* v. *Enterprise Assoc. Steamfitters Local No. 638*, 400 F. Supp. 993, 996-97 (S.D.N.Y. 1975, *aff'd sub nom. E.E.O.C.* v. *Enterprise Assoc. Steamfitters Local No. 638*, 542 F.2d 579 (2d Cir. 1976), *cert. denied*, 420 U.S. 911 (1977).

B. No bonus or incentive awards are sanctioned or appropriate under Section 1988.

Petitioner respectfully urges the Court to prohibit any bonuses or incentive awards as part of attorney's fees under § 1988. Those courts that have authorized the award of bonuses or multipliers have either misread the legislative history of the statute or misapplied the "common fund" theory historically applied in stockholder derivative and antitrust cases.

Because § 1988 is an exception to the American rule of law barring prevailing litigants from obtaining counsel fees from their opponents, *Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), its scope must be defined by the specific language of the statute. This Court cautioned in *Alyeska:*

"Since the approach taken by Congress . . . has been to carve out specific exceptions to a general rule that

> federal courts cannot award attorney's fees beyond the limits of 28 U.S.C. § 1923, those courts are not free to fashion drastic new rules with respect to the allowance of attorney's fees to the prevailing party in federal litigation . . ." 421 U.S. at 269.

That warning was heeded by the Sixth Circuit Court of Appeals in *Northcross* v. *Board of Education of the Memphis City Schools,* 611 F.2d 624, 638 (6th Cir. 1979), *cert. denied,* 447 U.S. 911 (1980), which recognized that the bonus concept is alien to the principle of reasonable compensation underlying § 1988:

> "Such a 'bonus' would indeed be a 'windfall', unnecessary to attract competent counsel, and grossly unfair to the defendants, who in most cases will be paying the award out of public funds. We see no reason to allow individual attorneys, no matter how important the rights they have vindicated, to receive unearned personal gain at the public expense."*

See also *Oliver* v. *Kalamazoo Board of Education,* 576 F.2d 714, 715 (6th Cir. 1978).

No reference was made to a "bonus" or "multiplier" during the House or Senate debates on the bill which became the Civil Rights Attorney's Fees Award Act of 1976 (S. 2278). However, the following language in the Senate Report, upon which proponents of bonus awards rely, has been the source of considerable confusion**:

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* The Sixth Circuit's rejection of a bonus as unnecessary to attract counsel is antithetical to the concept of an "incentive award" enunciated by the district court in this case (J.A. 358). In fact, where legal aid attorneys are involved, there is no need or basis for a bonus as an incentive. It is their job to take on such risky cases; lodestar awards based on the average rates or costs of private law firms are incentive enough.

** Even as strong an advocate for attorney's fees for public interest firms as E. Richard Larson has referred to this language as "somewhat oblique." *Larson, Federal Court Awards of Attorney's Fees* (1981), at p. 116.

> "It is intended that the amount of fees awarded under [the Fees Act] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases, and not be reduced because the rights involved may be nonpecuniary in nature. The appropriate standards, see *Johnson* v. *Georgia Highway Express*, 448 F. 2d 714 (5th Cir. 1974), are correctly applied in such cases as *Stanford Daily* v. *Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974); *Davis* v. *County of Los Angeles*, 8 E.P.D. § 9444 (C.D. Cal. 1974); and *Swann* v. *Charlotte-Mecklenburg Board of Education*, 66 F.R.D. 483 (W.D.N.C. 1975). S. Rep. No. 94-1011, 94th Cong., 2d Sess., 6 (1979)."

Bonus awards proponents specifically argue that because the antitrust cases, and the *Stanford Daily*, *Davis* and *Swann* cases, involved upward adjustments of attorney's fees, that practice must have been sanctioned by Congress. While the latter cases involved modest upward adjustments in determining an overall fee, the effect of those adjustments was to provide hourly rates which were reasonable (ranging from $35 to $65 per hour) and consistent with the normal billing rates of the attorneys involved.* None of those cases sanctioned the routine or automatic application of a multiplier to the lodestar amount.

Additional proof that the above-cited excerpt from the Senate Report was not meant to sanction the award of a "bonus" is provided by the remarks of Senator Kennedy, the floor sponsor of § 1988. Despite the language of the Senate Report equating the standard to be applied in civil rights cases with the standard for antitrust cases, Senator Kennedy rejected the notion that the amount of attorney's

* In *Stanford Daily*, for example, the $50 per hour awarded was similar to the $50 to $65 per hour that the attorneys involved had billed their clients.

fee awards to civil rights attorneys would be the same as in antitrust cases. In response to a charge that the bill was intended to enrich civil rights attorneys just as the Hart-Scott-Rodino bill had allegedly done for the antitrust bar, Senator Kennedy stated:

> "We are not talking about the kind of attorneys' fees that were included in the antitrust bill. You do not get rich from protecting civil rights of citizens whether they are in my own city or Boston or in Birmingham. And the determination of this is left, in any event, to the discretion of the courts." 122 Cong. Rec. S. 16449 (September 22, 1976).

Accordingly, the Senate Report merely offers the general fee fixing approach used in complex litigation, such as antitrust cases, as a point of reference—where appropriate and consistent with the overall objective of § 1988 that fees be "adequate to attract competent counsel, but which do not provide windfalls to attorneys."* Bonus awards, routinely applied in civil rights cases, have had the very effect criticized by the sponsors of the Fee Awards Act—the enrichment of attorneys.

Finally, the case providing the "appropriate standards," *Johnson* v. *Georgia Highway Express, supra,* merely set forth the factors to be considered in evaluating a reasonable fee. It does not sanction bonus awards. Most, if not all, of the *Johnson* factors—e.g., the novelty and difficulty of the issues, skill displayed and the results obtained—are already incorporated into the lodestar amount (especially where a market valuation is used), because of their relevance to the hourly rate and the amount of time spent on the case. *Copeland* v. *Marshall, supra,* 641 F.2d

* S. Rep. No. 94-1011, 94th Cong. 2d Sess. 6 (1976); cf. H.R. Rep. No. 94-1558, 94th Cong. 2d Sess. 9 (1976).

at 890; *Northcross* v. *Board of Education, supra* at 642; *Hughes* v. *Repko,* 578 F.2d 483, 488 (3d Cir. 1978). To reapply the same factors to justify a bonus award is the essence of a windfall.

Petitioner further submits that imposing the payment of bonuses by defendants under fee shifting statutes, such as § 1988, is a misapplication of the "common fund" or "equitable fund" doctrine applied in antitrust and stockholder derivative actions, from which the concept of bonuses had its origins.*

In an antitrust or stockholders' derivative action, the beneficiaries of a common fund (usually the shareholders of the corporation) can be assumed to have shared in the benefits resulting from the plaintiff's attorney's services through the enhancement or salvaging of the fund. By contrast, the award of a bonus to plaintiff's attorneys in § 1983 cases is paid by the defendants (or taxpayers) who have not shared in any of the benefits arising from the litigation. See *Mills* v. *Electric Auto-Lite Co.,* 396 U.S.

* The "common fund" doctrine was first applied by this Court in *Trustees* v. *Greenough,* 105 U.S. 527 (1881), where a bondholder of a railroad company, suing on behalf of himself and other bondholders, charged the trustees of a fund pledged for the payment of the bonds with wasting the fund's assets. The litigation resulted in a large amount of the fund being secured for the bondholders. This Court upheld the payment of the complainant's claim for reimbursement of his lawyer's fees out of the trust fund because the other bondholders "ought to contribute their due proportion of the expenses which he has fairly incurred" and to make those expenses "a charge upon the fund is the most equitable way of securing such contribution." 105 U.S. at 532. Three years later, in *Central Railroad and Banking Co.* v. *Peters,* 113 U.S. 116 (1885), this Court extended the *Greenough* doctrine by conferring upon lawyers who had already been paid a fee by their clients an independent right to an extra reward to be paid by involuntary beneficiaries to the common fund enhanced by the lawyer's efforts. The opportunities for attorneys to be compensated from the beneficiaries of a common fund were further enhanced by this Court's decisions in *Sprague* v. *Ticonic National Bank,* 307 U.S. 161 (1939), and *Mills* v. *Electric Auto-Lite Co.,* 396 U.S. 375 (1970).

375 (1970). Indeed, attorney's fees awards have been prohibited in shareholders' suits, and in other common fund cases, where the effect of awarding them would be to cast a winner's litigation costs on a losing adversary. *Dawson, Lawyers and Involuntary Clients in Public Interest Litigation*, 88 Harv. L. Rev. 849, 859 (1975); *Gerstle* v. *Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1308-10 (2d Cir. 1973); *Jones* v. *Uris Sales Corp.*, 373 F.2d 644 (2d Cir. 1967).

However, the award of a fee exceeding the amount resulting from multiplying an hourly rate by the reasonable time expended has proved just as troublesome in common fund cases as under § 1988. In response to bitter complaints voiced by laymen* and the judiciary** that attorneys in common fund cases had been obtaining windfall contingent fees coming out of the pockets of other shareholders who were strangers to the attorneys when the suit was filed, the Third Circuit in *Lindy Bros.* v. *American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973) (*"Lindy I"*), and the Second Circuit in *City of Detroit* v. *Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974) (*"Grinnell I"*), both common fund antitrust cases, rejected the overall contingent fee approach. In its place, both Circuits promulgated the so-called "lodestar" approach for determining attorney's fee awards by multiplying the hours that the attorney worked on the case by a "reasonable hourly rate for his time—taking account of the attorney's legal reputation and status." *Lindy I*, 487 F.2d at 169; *Grinnell I*, 495 F.2d at 470-71.

Yet, because both *Lindy* and *Grinnell* were common fund cases, the courts did not completely abandon the

* See e.g. *Graham, Guest Opinion on Legal Fees: Fluffing the Golden Fleece*, Juris Doctor, 10-11 (Feb. 1973).

** See *Illinois* v. *Harper & Row Publishers*, 55 F.R.D. 221 (N.D. Ill. 1972); *Free World Foreign Cars, Inc.* v. *Alfa Romeo*, 55 F.R.D. 26, 30 (S.D.N.Y. 1972); *Cherner* v. *Transitron Electronic Corp.*, 221 F. Supp. 55, 61 (D. Mass. 1963).

contingency factor. Rather, an upward adjustment of the attorney's compensation was permitted after consideration of the attorney's "risk of litigation." *Lindy I*, 487 F.2d at 168; *Grinnell I*, 495 F.2d at 471.* However, in *Grinnell II*, *supra* at 1099, the Second Circuit rejected any upward adjustment at all, stating that "the courts must be mindful that an attorney will receive an otherwise reasonable compensation for his time from the lodestar figure alone."

Finally, in the event that this Court should reject petitioner's main contention that special bonuses are not authorized or appropriate in Section 1988 cases, we believe it is imperative that clear standards be stated to ensure that any such special adjustments (i) are allowed only in truly exceptional cases where *multiple criteria* such as the risk, novelty and complexity of the case, quality of legal representation and extraordinary results achieved are *all* present and (ii) not be allowed in routine cases such as the one at bar. In addition, to satisfy the overriding principle of § 1988 that reasonable compensation be provided and windfalls avoided, any such adjustments should be modest and, we submit, subject to a ceiling to curb abuses by the district courts.

One approach was offered in *New York State Ass'n for Retarded Children* v. *Carey*, *supra*, an "extraordinarily difficult case" which "raised novel questions of constitutional interpretation" where the court recognized the "exemplary nature of the services rendered" by plaintiffs' attorneys. Slip op. at 4597. The Second Circuit, notwithstanding the presence of these considerations, rejected the

* While the Third Circuit in *Lindy I* also spoke of the possibility of an adjustment—upward or downward—of the lodestar based on the quality of legal work, 487 F.2d at 168, that Circuit in *Lindy II*, 540 F.2d at 118, limited such adjustments to reflect "exceptional services only" and noted that the "heavy burden of proving entitlement to such an adjustment is on the moving party." *See Grinnell II*, 560 F.2d 1093, 1100-01 (2d Cir. 1977).

district court's award of a 25% to 50% bonus* and limited the bonus awarded to a 10% adjustment. If modest bonus awards are to be authorized under § 1988, they could be limited to a similar fixed maximum amount. Such a limitation would help to prevent gross windfall awards which "make the private attorney general's position so lucrative as to ridicule the public attorney general." *Johnson* v. *Georgia Highway Express, Inc., supra* at 719.

An alternative approach would be for the Circuit Courts to establish a fixed dollar ceiling (for example, $75 per hour) within which district courts would be authorized, in exceptional cases, to make a modest upward adjustment of an attorney's base award so long as the resulting *total* hourly rate (i.e., lodestar plus upward adjustment) did not exceed the ceiling.** This ceiling would ensure that adjustments did not result in exorbitant fee awards while allowing non-profit organizations, small private firms and sole practitioners, with hourly rates lower than the ceiling, to be compensated above their ordinary rates in extraordinary cases.

POINT III

The district court abused its discretion by awarding attorney's fees based on unsupported and duplicative claims unauthorized under 42 U.S.C. § 1988.

The third major factor contributing to the unreasonable windfall awarded to respondent's attorneys was the district court's allowance of undocumented and duplicative hours. By summarily accepting all 809¾ hours claimed by respondent's three attorneys, the district court abused

* A 50% bonus for work done before the signing of the consent decree and a 25% bonus for work done thereafter.

** Where the lodestar rate exceeded $75 per hour, no adjustment would be authorized.

its discretion by failing (a) to identify and exclude hours unsupported by contemporaneous time records or other detailed documentation, and (b) to eliminate facially duplicative hours claimed by several attorneys without sufficiently detailed information justifying the division of labor. The conclusory approach of the courts below is inconsistent with the requirements of this Court and most Circuits that the facts underlying the hours claimed must be specified in sufficient detail to permit the district court to make an independent determination whether or not the hours claimed are justified. *Hensley* v. *Eckerhart*, —— U.S. ——, 103 S. Ct. 1933, 1943 (1983) (Burger, J., concurring); *National Association of Concerned Veterans* v. *Secretary of Defense*, 675 F. 2d 1319, 1327 (D.C. Cir. 1982); *Davis* v. *Fletcher*, 598 F. 2d 469, 470 (5th Cir. 1979); *Northcross v. Board of Education, supra* at 636; *International Travel Arrangers, Inc.* v. *Western Airlines, Inc.*, 623 F. 2d 1255, 1276 (9th Cir. 1980).

A. Accurate assessment of the hours reasonably expended is the cornerstone of a fee award under § 1988; consequently, hours unsupported by contemporaneous time records or detailed documentation of reconstructed hours should be excluded.

In *Hensley* v. *Eckerhart, supra* at 1939, this Court said:

> "The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services. The party seeking an award of fees should submit evidence supporting the hours worked and rates claimed. Where the documentation of hours is inadequate, the district court may reduce the award accordingly.

> The district court also should exclude from this initial fee calculation hours that were not "reasonably expended." S. Rep. No. 94-1011, p. 6 (1976). Cases may be overstaffed and the skill and experience of lawyers vary widely. Counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission. "In the private sector, 'billing judgment' is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority." *Copeland* v. *Marshall*, 205 U.S. App. D.C. 390, 401, 641 F. 2d 880, 891 (1980) (en banc) (emphasis in original).

And, as Chief Justice Burger wrote in his concurring opinion in *Hensley, supra* at 1943:

> "A District Judge may not, in my view, authorize the payment of attorney's fees unless the attorney involved has established by clear and convincing evidence the time and effort claimed and shown that the time expended was necessary to achieve the results obtained."
>
> * * *
>
> "As a result, the party who seeks payment must keep records in sufficient detail that a neutral judge can make a fair evaluation of the time expended, the nature and need for the service, and the reasonable fees to be allowed."

The fee application submitted by respondent's attorneys was insufficient to allow the district court to make a proper determination that the hours claimed were reasonable. While Mr. Fried apparently based his claim on contemporaneous time records (J.A. 308), Ms. Moynihan stated

that at least some of her claimed hours "were reconstructed from the files maintained in this case" (J.A. 320), and Ms. Galowitz based her claimed hours, in part, on "case cards and consultations with (her) co-counsel" (J.A. 335). No breakdown was provided in the application between hours based on contemporaneous time records and hours reconstructed from other sources. Nor was any substantiation of "reconstructed" hours provided other than Ms. Moynihan's conclusory statement that the time estimates were "conservative" (J.A. 320). The district court, in turn, made no effort either to identify those hours supported by the time records and those based on reconstruction, or to inquire into the basis of that reconstruction. It was, therefore, in no position to make an independent determination whether or not the hours claimed were justified. *Hensley* v. *Eckerhart, supra* at 1939; *Johnson* v. *Georgia Highway Express, supra* at 717.

In a case where plaintiff's attorneys similarly failed to submit adequate documentation, the Circuit Court in *New York State Ass'n for Retarded Children* v. *Carey, supra,* at 4582-83,* mandated that all future attorney's fees applications be supported by contemporaneous time records—a requirement imposed by other Circuits as well. See *National Ass'n of Concerned Veterans* v. *Secretary of Defense, supra* at 1327 (D.C. Cir. 1982); 5th Cir. R. 22.2, *reprinted* in 693 F. 2d No. 3, at lxxiii (Jan. 10, 1983). This Court should remand with a direction to exclude all hours unsupported by contemporaneous time records or other detailed documentation.

* In that case, plaintiffs' attorneys "reconstructed" their time records "based on their present recollection of hours spent years before." Slip op. at 4570. "Although five attorneys used a list of documents to refresh their recollection, only one of the attorneys consistently reexamined the documents, and all estimated a portion of their time without reference to a supporting document list." Slip op. at 4571.

B. All hours claimed for potentially duplicative work should be excluded where plaintiff's attorneys failed to submit an adequate description of how their labor was divided to avoid duplication.

Where a party is represented by more than one attorney, "the possibility of duplication of effort along with the proper utilization of time should be scrutinized." *Johnson* v. *Georgia Highway Express, supra* at 717. That possibility was a near certainty here, where almost two-thirds of the hours claimed—in excess of 500 hours—represented joint activity by at least two of respondent's attorneys, and in excess of 65 hours represented claims by all three attorneys for the same work, including discussions among themselves and joint appearances. The district court's failure to inquire whether entries for the same work involved unnecessary duplication and its bald conclusion, unsubstantiated by the record, that it was "satisfied by the affidavits submitted by plaintiff's counsel that the work performed outside the courtroom was divided in such a way as to avoid duplication" (J.A. 357-58), constituted an abuse of discretion.

Absent specificity as to how responsibility for services performed was actually divided, the court below erroneously rejected the presumption that duplication is inherent where more than one attorney is involved. *Northcross* v. *Board of Education, supra* at 636. If deductions for duplication are to be avoided, a "convincing description of the division of labor must accompany reports of contemporaneous or identical work performed by several attorneys." *Furtado* v. *Bishop*, 635 F. 2d 915, 922 (1st Cir. 1980).

The potentially duplicative hours claimed by respondent's attorneys pervaded their fee application and, therefore, the failure to provide a sufficiently detailed explanation was particularly offensive. For example, although 422.5 hours, more than half the total hours allowed, were

claimed for motion papers produced by joint effort, the time records and affidavits submitted provide almost no indication of whether or how responsibility for work on the motions was divided.* Nor was any specificity provided in the supplemental affidavits submitted by respondent's counsel in response to petitioner's objections to their fee application. For example, Ms. Moynihan's affidavit merely states, "Mr. Fried, Ms. Galowitz and I, throughout the course of this litigation, divided responsibility for various discrete issues or tasks connected with the litigation" (J.A. 346).** This is precisely the sort of

* Approximately 151 hours (twenty-one 7½-hour days, or more than four work weeks) were claimed for papers submitted in support of respondent's cross-motion for summary judgment and in opposition to petitioner's and the federal defendant's motion to dismiss. Ms. Moynihan claimed 82 hours, Ms. Galowitz claimed 59 hours and Mr. Fried claimed 9¾ hours (J.A. 310, 327-28, 338-39). Ms. Moynihan's time records simply state that she spent those hours on "Research and preparation of motion for summary judgment and of opposition papers to state and federal motions" (J.A. 327-28). Ms. Galowitz's time records similarly state without specificity that she spent her hours on "Research and preparation of motion for summary judgment and opposition papers to state and federal motions" (J.A. 338-39). The arguments raised in this motion were repeated in the proposed intervenors' motion for the same relief, for which a total of approximately 74 hours was claimed by Ms. Moynihan and Ms. Galowitz, again without any explanation of who did what. See J.A. 325-26 (Ms. Moynihan's claim for 41.5 hours) and J.A. 337-38 (Ms. Galowitz's claims for 32.5 hours). An additional example of the duplicative nature of the hours claimed and allowed is the 104.5 hours claimed for respondent's brief on petitioner's appeal (which was directed solely to the relief granted, not the underlying merits) (Moynihan 93 hours [J.A. 330], Fried 11.5 hours [J.A. 314]), and a further 93.5 hours claimed by Ms. Moynihan and Mr. Fried for briefing the same issues in opposition to petitioner's first petition for certiorari, again with no explanation of how responsibility was divided (Moynihan 59 hours [J.A. 331], Fried 34.5 hours [J.A. 314-15]).

** Ms. Galowitz's affidavit fails to address the issue of division of labor at all (J.A. 349-50). Mr. Fried's affidavit similarly fails to specify which attorney did what type of work on any of these motions. Mr. Fried merely stated that: "All tasks arising during the course of litigation were performed in the following manner: All three attorneys would meet or talk over the telephone to discuss strategy.

(footnote continued on next page)

sketchy, self-serving statement rejected as inadequate in *Furtado* v. *Bishop, supra* at 922.

The failure to justify repeated duplicative entries in respondent's attorney's fee application warrants the disallowance of *all* hours claimed for joint effort where the division of labor was unexplained. *Northcross* v. *Board of Education, supra* at 636. In addition to these specific disallowances, an across-the-board percentage reduction would also be appropriate in recognition of the fact that each incident of duplication is not readily apparent from the record and that the pervasive pattern of duplicative claims indicates that all of respondent's claims were inflated. See *Copeland* v. *Marshall, supra,* 641 F. 2d at 903; *Furtado* v. *Bishop, supra* at 923; *Oliver* v. *Kalamazoo Board of Education, supra; Bradford* v. *Blum,* 507 F. Supp. 526, 534 (S.D.N.Y. 1981).

C. Proposed standards for the elimination of excessive and duplicative attorney's fees awards.

Petitioner submits that strict standards of review are necessary to ensure that the critical component of attorney's fee awards under § 1988—the hours expended—is not excessive or duplicative. These standards would cut down on inflated claims, minimize what has become complex attorney's fee litigation, and drastically reduce the time the courts must devote to such litigation. See *New York State Ass'n for Retarded Children* v. *Carey, supra* at 4584.

One attorney assumed responsibility for research, analysis and drafting. A second attorney then reviewed the written draft and either the reviewer or the original drafter would make revisions" (J.A. 347). That purported explanation conflicts with respondent's attorneys' own entries in their time records. For example, of 82 hours claimed by Ms. Moynihan for research and preparation of plaintiff's motion for summary judgment, commencing on 3/30/79 (J.A. 327-28), only one hour is claimed for review (time entry for 4/11/79 [J.A. 328]). The 59 hours claimed by Ms. Galowitz for research and preparation of the same motion also commenced on 3/30/79 (J.A. 337). Clearly, the responsibility for this motion was not divided in the manner suggested by Mr. Fried.

While petitioner does not seek to deprive district court judges of discretion to decide how many hours are reasonable for any given task, the following standards are proposed as a framework in which consistent and reasonable fee awards are to be made.

First, applicants for § 1988 fee awards must bear the burden of justifying the hours claimed by clear and convincing evidence.* Second, district courts should require sufficiently detailed submissions as to the nature of services performed and the division of labor, rejecting conclusory and general statements of fee applicants concerning the reasonableness of the hours claimed, and should further specify the facts underlying their determinations of reasonableness.** Third, any uncertainties in the hours claimed should be resolved against the fee applicant.†

Fourth, contemporaneous time records specifying the nature of the work performed by each attorney should be a mandatory prerequisite for a fee award under § 1988.‡ Finally, absent a convincing, detailed description of the division of labor accompanying claims of contemporaneous or identical services, deductions should be made for *all* hours claimed that are potentially duplicative.¶

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* *Hensley* v. *Eckerhart*, *supra* at 1943 (Burger, C.J., concurring).

** *International Travel Arrangers* v. *Western Airlines*, *supra* at 1276; *Northcross* v. *Board of Education*, *supra* at 636; *Davis* v. *Fletcher*, 598 F. 2d 469, 470 (5th Cir. 1979).

† *Ross* v. *Saltmarsh*, 521 F. Supp. 753, 761-62 (S.D.N.Y. 1981); *Kane* v. *Martin Paint Stores, Inc.*, 439 F. Supp. 1054, 1057 (S.D.N.Y. 1977), *aff'd without opinion*, 578 F. 2d 1368 (2d Cir. 1978); *Blank* v. *Talley Industries, Inc.*, 390 F. Supp. 1, 4 (S.D.N.Y. 1974).

‡ *New York Ass'n for Retarded Children* v. *Carey*, *supra* at 4583; *National Ass'n of Concerned Veterans* v. *Secretary of Defense*, *supra* at 1327.

¶ *Furtado* v. *Bishop*, *supra* at 922-23. There, the court reduced the hours claimed for an appellate brief by half "to reflect possible duplication of effort and diseconomies of committee authorship that may occur in a case where there is no demonstration to the contrary."

The consistent application of uniform standards for the award of reasonable attorney's fees would, in addition to reducing all-too-common windfall awards by the district courts, avoid a second major litigation on the fee request. Plaintiffs' attorneys would be free to pursue other civil rights litigation. Defendants would avoid payment of fees for litigating fee requests, and their attorneys would be able to get out from under the barrage of § 1988 litigation. The courts would be able to devote their energies to other more substantive and socially productive litigation.

Conclusion

For the reasons stated herein, the Order of the court below should be vacated and this case remanded for the determination of a reasonable attorney's fee award.

Dated: New York, New York
August 15, 1983

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No. 81-1374

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BARBARA BLUM, individually and in her capacity as Commissioner of the New York State Department of Social Services,

Petitioner,

v.

ELLEN STENSON, individually and on behalf of all other persons similarly situated,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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QUESTIONS PRESENTED

1. Did Congress intend that attorneys for prevailing parties, without distinction between non-profit and profit-making firms, be awarded fees under 42 U.S.C. § 1988 on the basis of the value of the services rendered?

2. Did Congress intend that district courts have discretion under § 1988 to grant an upward adjustment of the base fee figure for both non-profit and profit-making firms, to take account of applicable factors not fully reflected in the hourly rate?

3. Would the adoption of a cost-based approach to the calculation of § 1988 fee awards generate complex and unmanageable cost-accounting questions, embroil the judiciary in inappropriate rule-making and regulatory tasks, create additional lengthy and burdensome litigation, and discourage both private and non-profit firms from undertaking the litigation of important civil rights cases?

4. On the uncontested evidence before them, did the lower courts properly exercise their discretion in finding the time expended on this litigation to be reasonable, in determining the value of the services rendered, and in adjusting the lodestar upward to reflect the complexity and novelty of the issues, the risk involved, the results obtained, and the high quality of the representation?

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STATEMENT OF THE CASE

In its brief to this Court, the State seeks to portray this case as routine, uncomplicated, and generally of no great signficance. Because this characterization is fundamentally wrong, and since it bears so directly on the validity of the attorney fee award at issue in this Court, a detailed recitation of the history of this litigation is required.

THE MERITS

The Investigative Stage

At the time this suit was filed, Ellen Stenson was a 77-year-old widow suffering from a severe cardiac condition, the effects of a stroke and a number of other serious medical impairments. She required the services of a housekeeper to bathe and feed her and to ensure that she took her medication.[1] Mrs. Stenson became eligible for Medicaid when she applied and was found eligible for Supplemental Security Income (S.S.I.) benefits.[2]

In July 1978, Mrs. Stenson was notified by the Department of Health, Education and Welfare (HEW) that she no longer was eligible for S.S.I. benefits. Shortly thereafter, Mrs. Stenson's Medicaid benefits were abruptly terminated by the State without notice or an opportunity for a hearing, despite her obvious continued eligibility. JA 124, 145.[3] Without Medicaid benefits, payments to Mrs. Stenson's housekeeper stopped

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[1] JA 40-41, 49, 123. These facts, and all others set forth in the text, are set forth in affidavits and Plaintiffs' 9(g) Statement of Material Facts Not in Dispute, and are not contested by the State.

[2] *See* 42 U.S.C. § 1396a(a)(10)(A); N.Y. Soc. Serv. L. § 366.1(a)(2). S.S.I. is a joint Federal-State program providing a minimum income for impoverished aged, blind and disabled individuals. Individuals eligible for Medicaid benefits by virtue of their S.S.I. eligibility are termed "categorically needy." *See Stenson* v. *Blum*, 476 F. Supp. 1331, 1334 (S.D.N.Y. 1979), *aff'd*, 628 F.2d 1345, *cert. denied*, 449 U.S. 885 (1980). JA 146 (hereinafter, references to the Opinions in this case will be to the Joint Appendix).

[3] Mrs. Stenson remained eligible for Medicaid benefits under the "medically needy" provision of the program. *See* 42 U.S.C. § 1396a(a)(10)(C); N.Y. Soc. Serv. L. § 366.1(a)(5).

and Mrs. Stenson was forced to pay $180.00 from her total monthly income of $346.00 in order to obtain prescribed medication and keep her housekeeper. If deprived of her housekeeper, Mrs. Stenson would have faced a threat to her life and health and the frightening prospect of institutionalization. JA 40-44.

Ann Moynihan,[4] Mrs. Stenson's attorney at the Legal Aid Society (the "Society"),[5] ascertained that it was the State's policy to terminate Medicaid benefits automatically upon the cessation of S.S.I. benefits without first determining whether the individual continued to be eligible for Medicaid, independent of eligibility for S.S.I., and without providing timely and adequate notice and the opportunity for a hearing. JA 142, 145. Thus, thousands of aged, blind and disabled residents of New York State lost their Medicaid benefits each month in the same manner as Mrs. Stenson.[6]

It soon became apparent that a successful challenge to these practices required plaintiffs' attorneys to surmount at least

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[4] Throughout the initial stages of this litigation, Ms. Moynihan, the attorney in the Society's neighborhood law office who first spoke to Mrs. Stenson and recognized the broad law reform issues presented, was the sole counsel for the plaintiff class. She was supervised by John Kirklin, Director of Litigation of the Civil Division of The Legal Aid Society, Marshall Green, then a senior staff attorney and now a Trial Coordinator, and Constance Carden, a senior staff attorney. No compensation was sought for the services of Kirklin, Green and Carden. JA 322-325. *See also* JA 310, 311, 314, 315, 340, 343.

[5] The Legal Aid Society is a private, non-profit law office dedicated since 1876 to providing quality legal representation to New Yorkers who cannot afford a lawyer. The Civil Division, which provided representation in this case, is supported primarily by contributions from law firms, foundations and individuals. In the fiscal year ended June 30, 1983, approximately 76% of the cost of program services provided by the Civil Division was funded by nongovernmental contributors. *The Legal Aid Society 1983 Annual Report*, at 49-52 (lodged with the Court).

[6] Between January 1, 1977 and November 30, 1979, 113,688 class members, (approximately 39,000 each year) were arbitrarily deprived of their Medicaid benefits without any procedural safeguards and at great risk to their lives and health. JA 219.

three formidable obstacles. The first stemmed from the involvement of three levels of government in the decision to discontinue benefits.[7] A second difficulty concerned whether the State, upon an individual's loss of "categorical eligibility," was required to investigate and make an independent determination of continued eligibility, prior to taking any action to discontinue Medicaid benefits. Finally, this litigation presented the novel issue of whether the notice and hearing regulations or the due process protections enunciated in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), were applicable when individuals lose the "categorical" basis of their Medicaid eligibility, but might retain eligibility under the "medically needy" concept in the statute. In resolving each of these issues, which were pressed forcefully by the State, the District Court would be addressing issues of first impression.

The Liability Stage

Mindful of these significant obstacles, plaintiffs' attorneys instituted this litigation in December 1978. Although the State now contends that the issues involved herein were "relatively routine," Brief for Petitioner, at 31, it vigorously pressed numerous complex arguments in the District Court.[8]

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[7] The pertinent state and federal regulations appeared to place the responsibility for making Medicaid eligibility determinations and providing notice on the State. An agreement between the Federal and State defendants, under which the Secretary of HEW agreed to determine Medicaid eligibility of S.S.I. recipients, raised the possibility that some of these functions had been transferred to the Federal defendant. Finally, it was the City defendant that actually implemented the State's directive to terminate medical assistance. JA 115-116, ¶ 5. These overlapping and potentially competing responsibilities of the local, state and federal governments for the administration of the Medicaid program raised legal and tactical difficulties for plaintiffs' attorneys because of the absence of prior court decisions in this area. These difficulties persisted throughout the action and supplied the State with some of its strongest defenses.

[8] It asserted that, in the unique circumstances surrounding termination of "categorical" Medicaid benefits due to the loss of S.S.I. eligibility, the regulatory provisions regarding advance notice and a pretermination opportunity to be heard did not apply, and that if applicable, they bound the Secretary of HEW and not the State. In response to plaintiffs' constitutional claims, the

The Federal defendant, also asserting a number of substantial defenses, moved for judgment on the pleadings.[9] The City defendant adopted the State's position and likewise moved to dismiss the complaint.

By this time it was apparent that many of the Society's clients faced similar life-threatening deprivations of medical care, and that the elusiveness of governmental responsibility that would constantly confront the plaintiffs would greatly complicate the litigation. Thus, to expedite the resolution of this important lawsuit, Arthur Fried and Paula Galowitz, two experienced attorneys, joined the litigation team. Consistent

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State argued that: (1) the rules governing the Medicaid program, including federal and state statutory and regulatory provisions and an agreement between the federal and state governments, do not accord plaintiffs a property interest sufficient to invoke Due Process protections; (2) even if such a property interest exists, the Due Process protections set forth in *Goldberg* v. *Kelly* do not apply to the termination of plaintiffs' Medicaid benefits since plaintiffs are applicants for, not recipients of, "medically needy" Medicaid benefits; and (3) the Federal government, not the State, is responsible for providing any required procedural protections. The State also argued that in any event, none of the applicable legal provisions required a redetermination of Medicaid eligibility under the "medically needy" standards when "categorical" eligibility ceases. Finally, the State asserted that the loss of Medicaid benefits by members of the plaintiff class did not threaten them with irreparable harm and that class certification was "patently undesirable." Memorandum in Support of the State Defendant's Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for a Preliminary Injunction and Class Certification (hereinafter "Memorandum"), at 7-32, 35-44.

[9] The Federal defendant argues that the Federal regulations applied to the termination of Medicaid benefits due to loss of S.S.I. eligibility and required the State to provide prior notice and the opportunity for a hearing. He agreed with the State, however, that former S.S.I. recipients were not entitled to a determination of continued eligibility for Medicaid benefits and that the State could terminate Medicaid benefits upon a determination of ineligibility for S.S.I., regardless of continued eligibility for Medicaid under the other provisions of Title XIX of the Social Security Act. Memorandum in Support of Federal Defendant's Cross-Motion for Judgment on the Pleadings and in Opposition to Plaintiffs' Motions for a Preliminary Injunction and Class Certification, dated March 27, 1979 (Federal Defendant's Memorandum), at 21-33.

with his expertise and experience in federal litigation in the public benefits area and his position in the specialized Civil Appeals and Law Reform Unit of the Society, Mr. Fried took a lead role in making basic strategy decisions and editing the written work. Ms. Galowitz, based upon her extensive experience with the administrative agencies involved, divided with Ms. Moynihan responsibility for research and drafting of the summary judgment briefs. JA 307-318, 334-343.

With three attorneys now working on the case, plaintiffs' counsel were able to digest the discovery material, address the legal issues raised by defendants' proliferation of arguments, and move for summary judgment in less than one month. Time was of the essence because each month thousands of needy aged, blind and disabled individuals were arbitrarily losing vitally needed Medicaid benefits. The three attorneys divided up the work along strict lines and, except for rare occasions, responsibility for researching and drafting discrete sections of the briefs was assigned to only one attorney, with one of the other two attorneys reviewing and editing the finished product. JA 307-308; ¶ 2; 319-320, ¶ 2; 334, ¶ 2; 346, ¶ 8; 347-348, ¶ 3.

In September 1979, the District Court ruled in favor of plaintiffs on substantially all of their claims. The court also certified a plaintiff class (JA 148-50) consisting of approximately 39,000 people each year. *See* n.6, *supra*. In its 23-page Opinion, the court adopted plaintiffs' position that the State was the responsible decision maker, and rejected both the State and Federal defendants' interpretations of the applicable statutory and regulatory provisions. The District Court thus held that the State's automatic termination of the Medicaid coverage of individuals found ineligible for S.S.I., without consideration of continued Medicaid eligibility under the "medically needy" criteria, violated the Social Security Act and the applicable regulations. This ruling was based upon plaintiffs' claim that, although no single statutory or regulatory provision was dispositive, a reading of the entire federal statutory and regulatory scheme indicates that such a procedure must have been contemplated. JA 157-162.

The State's failure to provide timely and adequate advance notice and the opportunity for a pretermination hearing was also found to violate Title XIX of the Social Security Act, and applicable Federal and State regulations. The State was required to restore Medicaid coverage to all individuals who had been illegally removed from the program since S.S.I.'s inception on January 1, 1974. JA 165-166. Plaintiffs' request for an award of attorneys' fees pursuant to 42 U.S.C. § 1988 was also granted. JA 166.

The Remedy Stage

Immediately after the District Court rendered its opinion, the parties exchanged detailed correspondence concerning the specific terms of the judgment. JA 191-251.[10] In December 1979, a Final Judgment containing substantially those provisions requested by plaintiffs' counsel was entered.[11]

With characteristic persistence, the State soon requested relief from paragraphs 11 and 12 of the Final Judgment, which granted relief to individuals previously deprived of Medicaid benefits due to the State's illegal practices. This motion raised additional complex constitutional and equitable questions and a statute of limitations defense.[12] Nevertheless, plaintiffs again prevailed in the District Court (JA 267-269), and ultimately on appeal, 628 F.2d 1345 (2d Cir. 1980).

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[10] The State's letters and proposed judgment raised a number of thorny issues, including: (1) whether class members should be notified of the availability of administrative remedies to obtain retroactive relief (JA 197); (2) whether such remedies were available (JA 208, 210-216); (3) how Medicaid benefits were to be restored to class members (JA 197-198, 207, 217-243); and (4) what form of notice should be sent to members of the plaintiff class (JA 244-251).

[11] Compare Final Judgment (JA 181-188) with Plaintiffs' Proposed Order and Final Judgment (JA 171-180).

[12] Relying on *Kimble* v. *Solomon*, 599 F.2d 599 (4th Cir.), *cert. denied sub nom. Buck* v. *Kimble*, 444 U.S. 950 (1979), and *Rothstein* v. *Wyman*, 467 F.2d 226 (2d Cir. 1972), *cert. denied*, 411 U.S. 921 (1973), the State argued that restoration of Medicaid benefits to such a large group of individuals, when there was a danger that many of them were actually ineligible for

The Enforcement Stage

Even entry of judgment did not ensure implementation of plaintiffs' hard-fought victory. While the modification motion was pending, plaintiffs' attorneys discovered that the prospective relief contained in the Final Judgment had not been implemented in at least two counties. JA 257-262. To remedy this, the plaintiffs sought an order adjudging the State in contempt. Based upon the representation at the contempt hearing that appropriate measures would be taken to assure future compliance with the Judgment, this motion was denied. JA 272.

The State appealed from that part of the Final Judgment that required reinstatement of Medicaid benefits to class members whose benefits had been discontinued without a prior determination of ineligibility or advance notice and pretermination hearing rights. *See* n.12, *supra*. The District Court's grant relief was affirmed from the bench by the Court of Appeals. JA 275-276.

Despite this affirmance, the State failed to give timely notification to the members of the plaintiff class of their right to restoration of Medicaid benefits. JA 279-280. After unsuccessfully attempting to resolve this problem without resort to the court (JA 280), plaintiffs' counsel once again were forced to apply for an order adjudging the State in contempt. JA 277-278. The motion was denied only because the State subsequently obtained a stay of that provision of the Judgment pending action on its petition for certiorari. JA 286.

The State's petition for certiorari was denied in October 1980. 449 U.S. 885. Nonetheless, full compliance with the Final Judgment still was not forthcoming. The State interpreted the class definition in a manner that totally eviscerated its meaning for many of the plaintiff class members. Once again, attempts

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benefits, was either barred by the Eleventh Amendment or was an improvident exercise of discretion. *See* Memorandum in Support of Defendant Blum's Motion for Relief from Judgment and for a Stay, dated January 22, 1980.

to resolve the problem amicably failed. JA 293-300. Plaintiffs were forced, for the third time, to apply to the court for relief. This contempt motion was settled when the State agreed to comply with paragraphs 11 and 12 of the Final Judgment in the twenty-two counties that had been ignoring their provisions.[13] JA 301-304.

THE FEE MOTION

On December 1, 1980, plaintiffs filed their motion for a reasonable attorneys' fee under 42 U.S.C. § 1988.

Plaintiffs' Prima Facie Case

In support of this motion, counsel submitted detailed affidavits specifically identifying each task for which compensation was requested and the time spent, on a daily basis, by each of the attorneys on these tasks. The record shows that counsel, working as a litigation team under the supervision of attorneys with considerable experience, efficiently divided and delegated responsibility for the various aspects of the litigation. JA 307-350.

The affidavits also recounted the breadth of experience and specialized expertise of the litigation team. Thus, it was noted that Mr. Fried had litigated a number of significant class actions in Federal Court as a member of the Civil Appeals and Law Reform Unit of the Society, which he joined after spending two years as a law clerk to a federal District Judge. JA 309, 316-318. Ms. Galowitz served as a law clerk to a judge of the New York State Court of Appeals and had extensive experience in all levels of administrative practice. JA 335-336. Ms. Moynihan had Federal and State court experience arguing constitutional and statutory claims, which enabled her to iden-

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[13] At least 923 class members in those 22 counties would have been denied restoration of Medicaid benefits had this third violation of the Final Judgment gone uncorrected. *See* Affidavit of Shirley Harvey-Cook, dated August 21, 1981, Exhibit filed in *Mehler* v. *Blum*, 80 Civ. 3531 (S.D.N.Y.) (hereinafter Harvey-Cook affidavit) (annexed as Exhibit 1 to Brief for Plaintiffs-Appellees, dated September 15, 1981).

tify the crucial issues in this litigation, and was well-versed in the day-to-day workings of the defendant agencies. JA 321, 332-333. The law school records of these attorneys were excellent. JA 308, 320, 335.

In requesting compensation for 809-3/4 hours of legal work, counsel chose to forego compensation for a substantial number of billable hours. Compensation was not requested for any of the hours expended on the case by the most experienced attorneys—supervisors and senior attorneys at the Society. *See, e.g.*, n.4, *supra*. Finally, plaintiffs' attorneys omitted a significant number of hours because the time records occasionally did not allow an accurate assessment of the time expended.[14] The Society did not request compensation for the services of law students on this litigation, and no compensation was sought for a number of fruitless settlement negotiations or for some conversations between counsel and the named plaintiff, Ellen Stenson. JA 345-346, ¶ 7.

As further evidence of the value of the services performed by plaintiffs' counsel, a dozen fee awards rendered in other civil rights cases and similarly complex federal litigation were cited. Hourly rates of $95 , $100 and $105 for Moynihan, Galowitz and Fried, respectively, were sought.[15]

Finally, plaintiffs requested that the lodestar figure obtained by multiplying the hours reasonably expended by the appropriate hourly rate be adjusted upwards by 50% to reflect

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[14] The vast majority of the hours for which compensation was requested was documented by contemporaneous time records. All of the hours claimed by Mr. Fried and Ms. Galowitz were derived from such records. JA 308, ¶ 3; 335, ¶ 3. Most of the hours claimed by Ms. Moynihan were reflected in contemporaneous time records, although some were derived from other entries in her files which were made contemporaneously with the performance of the services. For the latter, conservative estimates were used. Where these entries did not allow accurate estimation of the time spent on this litigation on a particular day, no compensation for those services was requested. JA 320.

[15] Plaintiffs' Memorandum in Support of their Motion to Establish the Amount of Attorneys' Fees, dated November 26, 1980, at 9-10.

the novelty of the issues presented, the complexity of the litigation, the important and far-reaching consequences of plaintiffs' success, the promotion of significant rights under Title XIX of the Social Security Act and the risk of the litigation, factors not fully considered in computing the lodestar.

The State's Defense

In response to plaintiffs' motion, the State conceded that the market value approach was the proper standard for fees under § 1988.[16] Moreover, the State waived its right to a hearing and accepted as true the facts to which the affidavits of counsel attested. The State did not challenge the accuracy of the time records or affidavits. It conducted no discovery, presented no testimony or evidence of its own, and chose to call none of plaintiffs' attorneys to the witness stand for cross-examination concerning their work on this case.[17] Instead, the State appealed to the knowledge and experience of the District Judge in weighing its claim that the time counsel expended pursuing or responding to more than a dozen motions before the District Court, an appeal to the Second Circuit and a petition for certiorari to this Court, was excessive and duplicative.

The State's only response to plaintiffs' proof concerning the value of counsel's services was to cite awards in cases it considered more indicative than those submitted by plaintiffs of the prevailing rates in New York City for attorneys of comparable skill and experience conducting equally complex federal litigation. Its sole objection in the District Court to plaintiffs' request for an upward adjustment in the lodestar was that it would come from state funds.[18]

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[16] *See* Defendant Blum's Memorandum of Law in Opposition to Plaintiffs' Motion for Attorneys' Fees, dated December 23, 1980 (hereinafter "Defendant's Fee Memorandum"), at 14.

[17] At the hearing on the fee motion, plaintiffs' counsel all appeared, in order to make themselves available for cross-examination. The State chose to rest on the papers submitted.

[18] Defendant's Fee Memorandum, at 14-15; JA 358.

The Fee Award

In its opinion, the District Court held that the complexity of the issues presented "fully warranted the hours devoted to [the proceedings before the Court]." The State's claim that the efforts of plaintiffs' counsel were duplicative was expressly rejected. JA 357-358. The District Court also concluded that the rates requested were "consonant with fee awards in cases of similar complexity and difficulty," JA 355. Finally, the District Court adjusted the lodestar upward by 50%, finding that:

> The quality of representation was high. The litigation was complex. The issues presented were novel, and the undertaking therefore risky. Finally, the outcome was of great benefit to a large class of needy people. JA 358.[19]

In October 1981, the Court of Appeals for the Second Circuit summarily affirmed the District Court's award. In its memorandum, the Circuit held that Judge Sweet had (1) "acted well within his discretion in concluding that the [809-3/4] hours for which the attorneys requested compensation did not represent duplicative or unnecessary efforts"; (2) "approved compensation at hourly rates comparable to the rates 'normally charged for similar work by attorneys of like skill in the area' and those rates frequently granted in civil rights and other equally complex cases," and (3) "acted well within his discretion in making an upward adjustment of fifty percent in the [lodestar] figure," "since the procedural and substantive issues in this case were extremely complicated, the quality of representation high, the outcome of great benefit to a large class of [needy] people, and the ultimate resolution uncertain." JA 363-365.

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[19] The District Court did not address the contentions currently made by the State, but not raised in the District Court, that the market value standard does not reflect the proper approach to fee setting under 42 U.S.C. § 1988, that § 1988 does not sanction an upward adjustment of the lodestar figure, and that counsel's time records were not sufficiently supported by contemporaneous or detailed documentation.

SUMMARY OF ARGUMENT

The thrust of the State's argument is that large numbers of grossly excessive "windfall" fee awards to prevailing civil rights plaintiffs, particularly those represented by non-profit organizations, require drastic action by this Court to rescue state and local governments from financial disaster. The relief sought is judicial repeal, presumably for § 1988 purposes only, of the traditional "value" basis for fee awards mandated by Congress and applied by the judiciary under more than a hundred fee statutes and the sanction provisions of the Federal Rules.[20] The State's proposed remedy is promulgation of a so-called "cost-related" standard that would compensate private attorneys for their salary and overhead "costs" plus a "reasonable profit," while essentially restricting non-profit attorneys to recovery of costs. The State's argument is utterly devoid of support in the legislative history of § 1988, would enhance the State's incentive to delay and protract litigation, and threatens to embroil the judiciary in wholly inappropriate and hotly contested accounting disputes.

First, the State fails to recognize that if there is to be a policy decision changing the basis for fee awards from "value" to "cost," that must be done by Congressional action. As this Court held in *Alyeska Pipeline Serv. Co.* v. *Wilderness Society*, 421 U.S. 240, 262 (1975) (hereinafter "Alyeska"), "the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine." Congress did so determine in enacting § 1988 and other statutes which uniformly reflect a Congressional intent that fee awards be based on the value or worth of the services rendered, that no distinction be drawn between non-profit and profit-making attorneys in fixing the amount of fee awards, and that no arbitrary cap or mechanical formula govern fee awards in civil rights cases.

Because the intended fee standards are the same for § 1988, Titles II and VII of the Civil Rights Act of 1964, the Voting

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[20] A list of these statutes and rules is lodged with the Court as Appendix 1.

Rights Act, the Freedom of Information Act and many other substantive areas, including antitrust and bankruptcy, any cost-based standards adopted here would necessarily have wide application, with unforseeable and profoundly unsettling effects on the enforcement of these laws. Such a decision should not be undertaken without the kind of hearing process and evidence gathering for which only Congress is equipped.[21]

Second, the proposed "cost-based" approach is no panacea and, indeed, may be a catastrophe. It is ironic that in an era of deregulation, where the market is increasingly recognized as the most efficient determinant of compensation for services rendered, the State would constitute the federal judiciary a Federal Attorneys Fees Regulatory Commission, would turn fee applications into exercises in cost accounting, and would convert § 1988 into a relief act for accountants. Promulgation of cost accounting standards for non-profit or profit-making law firms raises issues that would be difficult even for Congress, or a Congressionally established cost accounting standards board, to resolve. They are certainly inappropriate for the courts. Particularly unseemly is the regulatory role envisioned for the judiciary by the State's suggestion that, for fee award purposes, the lower courts promulgate schedules of average attorney salaries and billable hours in their locales.

Third, it is critical to understand that the pattern of abusive fee awards of which the State complains simply does not exist. The record of fee awards under § 1988 demonstrates that the lower federal courts have carefully scrutinized fee applications and have granted reasonable awards under appropriate criteria. The fees awarded have, in fact, been generally low in comparison with those in other federal litigation, such as antitrust cases, that Congress intended as the benchmark for § 1988 awards. Moreover, in just one year, the monetary value of the results obtained for the plaintiff class in this case exceeded by more than thirty times the fee award granted to plaintiffs' attorneys.

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[21] Congress has recently conducted such hearings on proposed amendments to § 1988.

Finally, the State's arguments in this Court come with a particularly heavy burden of justification because of inconsistent positions it has taken in the courts below and in other cases. The State largely waived in the District Court the arguments it now presses on this Court and, accordingly, should be precluded from challenging the factual and analytical bases of the award in this case. The State did not request the District Court to adopt a cost-based approach. In fact, the fee application was largely uncontested. The State chose to forfeit its right to discovery and an evidentiary hearing. On such a record, it is unfair and inappropriate to second-guess the District Court's exercise of discretion and its factual findings. Ironically, while seeking to hold non-profit firms essentially to recovery of their costs under § 1988, the State has championed successfully in the lower courts the right of state law departments to recover market-value fees for successful antitrust suits.

ARGUMENT

I. CONGRESS INTENDED THAT ATTORNEYS FOR PREVAILING PARTIES, WITHOUT DISTINCTION BETWEEN NON-PROFIT AND PROFIT-MAKING FIRMS, SHOULD RECEIVE REASONABLE FEES CALCULATED ON THE BASIS OF THE VALUE OF THE SERVICES RENDERED

This Court's recent decision in *Hensley* v. *Eckerhart*, 51 U.S.L.W. 4552, 4554-55 (May 17, 1983) (hereinafter "*Hensley*"), describes the two-step process by which Congress intended that reasonable attorneys' fees be computed: (1) a lodestar is calculated by multiplying the number of hours reasonably expended by a reasonable hourly rate to provide "an objective basis on which to make an initial estimate of the value of a lawyer's services"; and (2) the lodestar may be adjusted upward or downward on the basis of other considerations.

A. Congress Intended That The Starting Point In Determining A Reasonable Fee Be Calculation Of A Lodestar Based On Prevailing Billing Rates.

An analysis of the legislative history of § 1988 conclusively establishes the Congressional intent that a reasonable hourly rate for fixing the lodestar is the prevailing billing rate in the community without regard to the actual fee arrangement or the status of counsel. The Senate and House reports that accompanied § 1988, the cases cited in these reports as correctly applying the proper standards, and prior precedent incorporated by Congress in enacting § 1988, all lead ineluctably to this conclusion.

1. The Senate and House Reports

The key passage of legislative history evidencing congressional intent concerning the standard to be applied in awarding fees under § 1988 is found at page 6 of the Senate Report:

> It is intended that the amount of fees awarded under [§ 1988] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases and not be reduced because the rights involved may be nonpecuniary in nature. The appropriate standards, *see Johnson* v. *Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974), are correctly applied in such cases as *Stanford Daily* v. *Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974); *Davis* v. *County of Los Angeles*, 8 E.P.D. ¶ 9444 (C.D. Cal. 1974); and *Swann* v. *Charlotte-Mecklenburg Board of Education*, 66 F.R.D. 483 (W.D.N.C. 1975). These cases have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys.[22]

As this passage indicates, the cited decisions demonstrate proper application of the standards to be used in determining the amount of a reasonable fee award. *Hensley*, 51 U.S.L.W. at 4552-54. These decisions, which the State fails to address in

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[22] S. Rep. No. 1011, 94th Cong., 2d Sess. 6 (1976) (hereinafter "S. Rep.").

its brief, leave no doubt that Congress intended § 1988 fees for non-profit and profit-making firms alike to be calculated under traditional market value standards, and not on the basis of the cost of providing the services.[23]

In *Johnson* v. *Georgia Highway Express* (hereinafter "*Johnson*"), courts are directed to consider "[t]he customary fee for similar work in the community." 488 F.2d 714, 718 (5th Cir. 1974). The *Johnson* court did not deem it legally significant that among those awarded fees were staff attorneys of the NAACP Legal Defense and Educational Fund, Inc. Likewise, in *Stanford Daily* v. *Zurcher* (hereinafter "*Stanford Daily*"), the court warned against "decreasing reasonable fees because the attorneys conducted the litigation . . . as an act *pro bono publico*" and looked to billing rates "charged by other attorneys in [the] area for work involving complex questions of fact and law" as the measure of the value of the services rendered. 64 F.R.D. 680, 685 (N.D. Cal. 1974), *aff'd*, 550 F.2d 464 (9th Cir. 1977), *reh'g denied*, 439 U.S. 885 (1978).

Davis v. *County of Los Angeles* (hereinafter "*Davis*") also involved calculation of the fee to be awarded to a non-profit public interest law firm. There the court emphatically stated:

> In determining the amount of the fees to be awarded, *it is not legally relevant* that plaintiffs' counsel other than Mr. Herman are employed by the Center for Law In The Public Interest, a privately funded non-profit public interest law firm. It is in the interest of the public that such law firms be awarded reasonable attorneys' fees to be computed in the traditional manner when its counsel per-

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[23] Significantly, 39 states appearing here as *amici curiae* embrace the market value (or, as they call it, the "fee paying client") standard and take issue solely with the practice of adjusting the lodestar upwards. Brief of *Amici Curiae* 39 States, at 5-7. *But cf.* Brief of *Amicus Curiae* Massachusetts, at 47-64; Brief of *Amicus Curiae* United States, at 24-30.

> form legal services otherwise entitling them to the award of attorneys' fees.

8 Empl. Prac. Dec. ¶ 9444 at 5048-49 (emphasis added).[24]

Finally, *Swann* v. *Charlotte-Mecklenburg Board of Education* (hereinafter "*Swann*") held that:

> reasonable fees should be granted regardless of whether the individual plaintiffs were obligated to pay any fees . . . and regardless of whether the attorneys were salaried employees of a legal aid agency.

66 F.R.D. 483, 486 (W.D.N.C. 1975).

The House Report similarly manifests a clear intention to base fee awards on market-value billing rates for both public interest and private attorneys. Among the cases cited as properly reflecting the factors to be considered in computing a reasonable fee are *Torres* v. *Sachs*, 69 F.R.D. 343 (S.D.N.Y. 1975), *aff'd*, 538 F.2d 10 (2d Cir. 1976), and *Fairly* v. *Patterson*, 493 F.2d 598 (5th Cir. 1974). H.R. Rep. No. 1558, 94th Cong., 2d Sess. 8 n.16 (1976) (hereinafter "H. Rep."). These cases explicitly hold that fee awards may not be reduced because the prevailing party is represented by a civil rights organization or a non-profit public interest law firm or because counsel does not exact a fee. The appropriate standard remains "the going rates for similar services received by *privately employed counsel* for work of comparable importance, extent and complexity." *Torres* v. *Sachs*, 538 F.2d at 11 (emphasis added); *Fairly* v. *Patterson*, 493 F.2d at 606-607. *Accord*

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[24] This Congressional choice is aptly described by the District Court in *Clark* v. *American Marine Corp.*, 320 F. Supp. 709 (E.D. La. 1970), *aff'd*, 437 F.2d 959 (5th Cir. 1971) (per curiam), a case that is favorably cited in both *Johnson* and *Davis*:

> Congress certainly intended any award under the statute to be reasonable by traditional standards. It did not look, like Lear's jester, to the breath of the unfeed [sic] lawyer, but considered that the prevailing litigant should be able to pay the laborer the *worth of his hire*. 320 F. Supp. at 711 (emphasis added).

Hensley, 51 U.S.L.W. at 4558 n.6 (Brennan, J., concurring in part and dissenting in part).[25]

Perhaps the single most telling indication that Congress could not have intended cost-related standards to guide the determination of reasonable fees under § 1988 is the conspicuous omission from both the committee reports and the debates of even a single reference to the cost to the attorney of

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[25] These unambiguous expressions of Congressional intent are further buttressed by remarks made on the floor of the Senate and House by the sponsors of § 1988, Senator Tunney and Representative Drinan, specifically citing *Johnson* and the factor of the customary fee for similar work as providing the appropriate fee standards. 122 Cong. Rec. 32, 185 and 35,123 (1976). Indications of Congressional intent to award full market-value rates to non-profit public interest firms are also found in the legislative histories of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(a)(4)(E), the Equal Access to Justice Act, 5 U.S.C. § 504, 28 U.S.C. § 2412, and the Legal Services Corporation Act, 42 U.S.C. §§ 2996 *et seq.*

The FOIA is relevant because the operative statutory language — "reasonable attorney fees" — parallels the wording of § 1988. In the floor debates on that section Senator Kennedy clearly articulated the Congressional definition of that term:

> [C]ourts should look to the *prevailing rates* on attorneys' fees, for example, rather than solely to whether the specific attorney involved is from Wall Street or a public interest law firm. 120 Cong. Rec. 17,020 (1974) (emphasis added).

Both the Senate and House Reports accompanying the passage of the Equal Access to Justice Act expressly state that the $75 per hour ceiling on fee compensation rates under that statute

> . . .is not intended to affect or limit the computation of reasonable attorney fees under any other provision of law authorizing an award of fees for litigation under a particular statute, such as the Civil Rights Acts, designed to promote private enforcement of that Act.

S. Rep. No. 253, 96th Cong., 1st Sess. 16 (1979); H. R. Rep. No. 1418, 96th Cong., 2d Sess. 15 (1980). *See also* 125 Cong. Rec. 21,444-45 (1979) (statement of Sen. Kennedy).

In addition, as this Court noted in *Alyeska*, 421 U.S. at 262 n.36, the legislative history of the Legal Services Corporation Act makes clear Congress' intent that fee awards to legal service offices are not to be restricted.

providing the relevant services.[25] The lone passage cited by the State in support of its claim that Congress meant to incorporate a cost-related standard (Brief for Petitioner at 26) refers not to the cost to counsel of providing legal services, but to the cost to litigants of obtaining counsel. More significant is the statement of Representative Drinan, the sponsor of the bill in the House, that "the phrase 'attorney's fee' would include the *values of the legal services* provided by counsel. . . ." 122 Cong. Rec. 35,123 (1976) (emphasis added). Thus, the "cost" of obtaining counsel is the worth or value of the legal services in the marketplace.

2. Incorporation of Prior Precedent

Both the Senate and House Reports and the floor debates make clear that § 1988 was intended to codify the decisional law that had been interrupted by *Alyeska*.[27] The Reports pinpointed several cases, discussed *supra*, which set forth the market-value standards which Congress intended to incorporate.[28]

Equally clear is Congress' intent to assimilate into § 1988 the market-value standards for awarding attorneys' fees under Titles II and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-3(b) and 2000e-5(k), and § 402 of the Voting Rights Act Amendments of 1975, 42 U.S.C. § 19731(e). *Hensley*, 51 U.S.L.W. at 4554 n.7. *See also* S. Rep., *supra*, at 2, 4; H. Rep., *supra*, at 5. These standards "furnish full recompense for the value of services. . . ." *Torres* v. *Sachs*, 538 F.2d at 13.

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[25] The mention of "costs" in the cited cases only emphasizes their irrelevance to fee calculation. *See, e.g., Torres* v. *Sachs*, 538 F.2d 10, 11 (2d Cir. 1976); *Fairly* v. *Patterson*, 493 F.2d 598, 606-607 (5th Cir. 1974); *Swann*, 66 F.R.D. at 486; *Davis*, 8 Empl. Prac. Dec. ¶ 9444 at 5048-49.

[27] S. Rep., *supra*, at 6. Prominent among the pre-*Alyeska* decisions that reflect the market-value standard codified by Congress in § 1988 is the Court of Appeals decision in *Alyeska* itself, quoted in relevant part by the Supreme Court. 421 U.S. at 246, n.17.

[28] *See Cannon* v. *University of Chicago*, 441 U.S. 677, 699 (1979).

Also persuasive of Congressional intent is the Senate Report's express adoption of the "same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases." S. Rep., *supra*, at 6. It was well-settled that antitrust fee awards are to be calculated by reference to the market value of the services rendered.[29]

It is noteworthy that state attorneys general routinely seek and receive compensation at market rates in antitrust suits prosecuted by the states in their proprietary capacity or as *parens patriae*.[30] In *Illinois* v. *Sangamo Construction Co.*, 657 F.2d 855 (7th Cir. 1981), an *amici curiae* brief by 43 states, including New York, successfully argued that fee awards to states under the Clayton Act should be "based on the prevailing market rates charged by private attorneys with similar experience for similar work," that "costs should not be a determinative factor," and that "courts have not, and should not, become involved in cost analysis of a law office."[31] It is anomalous indeed that the State seeks market-value compen-

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[29] *See Lindy Bros. Builders, Inc.* v. *American Radiator and Standard Sanitary Corp.*, 487 F.2d 161, 166-168 (3d Cir. 1973), and *City of Detroit* v. *Grinnell Co.*, 495 F.2d 448, 471 (2d Cir. 1974), using the lodestar/adjustment method and approved by Congress as setting the appropriate standards. H. R. Rep. No. 803, 94th Cong., 2d Sess. 51-52 (1976).

[30] The relevant fee provisions are Sections 4 and 4C of the Clayton Act, 15 U.S.C. §§ 15 and 15c(a)(2). *See, e.g., In re Arizona Escrow Fee Antitrust Litigation*, [1982-83] Trade Cas. ¶ 65,198 at 71,821 (D.C. Ariz. 1982) (lodestar based on community rates, including $125 per hour for Chief Counsel of the Antitrust Division, $100 and $80 per hour for two staff attorneys, and $40 per hour for paralegals; multiplier of 2.0 justified even though the attorney general's office served "in a secondary role" for the "better part" of the litigation); *In re Fuel Oil Cases*, Trade Cas. [1982-2] ¶ 64,796 at 71,922-26 (M.D. Fla. 1982) (award of $469,994 based on market rates applicable to several assistant attorneys general ranging from $110 to $55 per hour and multiplier of 2.0).

[31] *Amici* brief, p. 5 (brief lodged as Appendix 2). Ironically, the States based their argument upon *Rodriguez* v. *Taylor*, 569 F.2d 1231 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978), which rejected a cost-based approach to the calculation of a fee awarded to a non-profit community legal services organization.

sation for its antitrust attorneys while urging cost-based compensation for attorneys in civil rights cases.

3. The Courts of Appeals

The Courts of Appeals have agreed overwhelmingly that Congress intended to award § 1988 attorneys' fees to non-profit and profit-making firms alike on the basis of market-value billing rates.[32]

The lone exception to this uniform precedent is the recent decision of a fractured panel of the Second Circuit Court of Appeals in *New York State Ass'n for Retarded Children, Inc.* v. *Carey*, 711 F.2d 1136 (1983), *petition for reh'g and reh'g en banc denied*, ___ F.2d ___ (August 2, 1983) (hereinafter "*Willowbrook*"), which rejected both the cost-based and market-value approaches to calculation of § 1988 fees and instead imposed an arbitrary ceiling on fee awards to non-profit firms.[33] In his opinion for the court, Judge Newman dis-

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[32] *Copeland* v. *Marshall*, 641 F.2d 880, 897-99 (D.C. Cir. 1980) (*reh'g en banc*); *Palmigiano* v. *Garrahy*, 616 F.2d 598, 601-02 (1st Cir.), *cert. denied*, 449 U.S. 839 (1980); *Rodriguez* v. *Taylor*, 569 F.2d 1231, 1248-50 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978); *Miller* v. *Apartments and Homes of N.J., Inc.*, 646 F.2d 101,113 (3d Cir. 1981); *Anderson* v. *Morris*, 658 F.2d 246, 249 (4th Cir. 1981); *Graves* v. *Barnes*, 700 F.2d 220 (5th Cir. 1983); *Johnson* v. *University College*, 706 F.2d 1205, 1210-11 (11th Cir. 1983); *Dowdell* v. *City of Apopka, Florida*, 698 F.2d 1181 (11th Cir. 1983); *Northcross* v. *Board of Educ.*, 611 F.2d 624, 638 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980); *Louisville Black Police Officers Organization, Inc.* v. *City of Louisville*, 700 F.2d 268, 274-78 (6th Cir. 1983); *Mary and Crystal* v. *Ramsden*, 635 F.2d 590, 602 (7th Cir. 1980); *Gautreaux* v. *Chicago Housing Authority*, 690 F.2d 601, 613 (7th Cir. 1982), *cert. denied*, 103 S.Ct. 2438 (1983); *Oldham* v. *Ehrlich*, 617 F.2d 163, 168-69 (8th Cir. 1980); *Collins* v. *Hoke*, 705 F.2d 959, 964 (8th Cir. 1983); *Dennis* v. *Chang*, 611 F.2d 1302, 1306-07 (9th Cir. 1980); *Ramos* v. *Lamm*, 713 F.2d 546, 551-52, 555 (10th Cir. 1983). This Court as well has held that the award of § 1988 fees is to be without regard to the status or source of fun.'ing of the plaintiff *Washington* v. *Seattle School District No. 1*, 458 U.S. 457 (1982).

[33] Prior to this decision, the Second Circuit had agreed with the other Courts of Appeals that Congress intended to award § 1988 fees to non-profit and profit-making firms alike on the basis of market-value billing rates. *Torres* v. *Sachs*, 538 F.2d 10 (1976); *Beazer* v. *New York City Transit*

approved the cost-based approaches preferred by the concurring judges because the uniform use of market rates was mandated by prior precedent and did not routinely produce windfall awards, and cost-based approaches "would burden the parties and the district courts with inevitable disputes about cost accounting." 711 F.2d at 1151. Judge Newman then decided that an arbitrary ceiling—styled a "break point"—should be imposed on the hourly rates awarded non-profit law firms under § 1988.[24]

The crucial error underlying Judge Newman's "break point" approach and the modified cost-based approaches of Judges Friendly and Wyzanski is the failure to recognize what all other Courts of Appeals, and the Second Circuit in its prior decisions, had found to be self-evident: that the cases cited in the key passage in the Senate Report all point unequivocally to market-value rates for all qualifying attorneys, whether non-profit or profit-making. In concluding erroneously that the "clues in the legislative history point in opposite directions," Judge Newman ignored the salient language of the three cases upon which other Circuit Courts had relied. Instead, he seized upon an isolated dictum of the District Court in *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, *supra*, 66 F.R.D. at 486, that "[o]bviously counsel for the defendants have charged more for similar though unsuccessful services than counsel for the plaintiffs will receive." Such dictum, arising in the context of a case involving the appropriate fee of a *profit-making* firm

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Authority, 558 F.2d 97,100 (1977), *rev'd*, 440 U.S. 568 (1979); *Carey* v. *New York Gaslight Club, Inc.*, 598 F.2d 1253, 1255 n.1 (1979), *aff'd*, 447 U.S. 54, 70 n.9 (1980).

[24] In his concurring opinion, Judge Wyzanski pointedly took issue with the "break point" approach, stating that:

> I look upon the $75 "break-point," proposed by Judge Newman, as a mere *ad hoc* device for disposing of the case at bar. The $75 figure apparently comes from The Equal Access to Justice Act, which was designed to compensate defendants whom the government had sued without basis; it has no relation to appropriate compensation for attorneys serving in Civil Rights Act cases.

711 F.2d at 1156.

doing *pro bono* work, hardly neutralizes the more important and relevant language from the three decisions cited in the Senate Report.

B. Congress Intended That Adjustments To The Lodestar Be Made, Where Appropriate, To Take Account Of All Of The Johnson Factors.

As this Court recognized in *Hensley*, 51 U.S.L.W. at 4555, Congress intended that full market-value is ascertained only after the lodestar is adjusted upward or downward to reflect any of the 12 *Johnson* factors to the extent they were not included in the initial calculation.

Confirmation of Congressional intent to permit the upward adjustment of the lodestar for non-profit law offices is provided by two of the cases identified by the Senate Report as awards that are "adequate" but "do not produce windfalls."[35] S. Rep., *supra*, at 6. The court in *Stanford Daily*, 64 F.R.D. at 685-87, adjusted the lodestar upward by approximately 27% to reflect the contingent nature of compensation, the novelty of the legal issues, the excellence of the legal services provided, and the results obtained. *Davis* granted an 18% upward adjustment of the base fee figure for a non-profit firm because of the difficulty of the litigation, the quality of representation, and the excellence of the results obtained. Finally, *Johnson* itself involved representation by a public interest firm.

The Courts of Appeals have generally focused on four of the *Johnson* factors as being of primary significance in the adjust-

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[35] The State's citation to *Northcross* for the novel proposition that upward adjustment of the lodestar is not authorized by § 1988 is in error. While rejecting the granting of a "bonus" award beyond fully compensatory fees, the Sixth Circuit in *Northcross* explicitly approved enhancement of the lodestar to take into account special circumstances in order to award a reasonable fee.

ment analysis:[36] (1) the results obtained;[37] (2) the quality of the representation; (3) the contingent nature of the fee;[38] and (4) the lost time value of the money.

Notwithstanding these clear expressions of Congressional intent, and the overwhelming weight of judicial authority, the State urges this Court to abandon adjustments in § 1988 fee awards, thus ignoring a number of *Johnson* factors in calculating a reasonable fee award, and to allow no contingency adjustment for non-profit firms.

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[36] *Copeland* v. *Marshall*, 641 F.2d 880, 892-94 (D.C. Cir. 1980) (*en banc*); *Minority Employees at NASA (MEAN)* v. *Frosch*, 694 F.2d 846 (D.C. Cir. 1982); *Maceira* v. *Pagan*, 698 F.2d 38, 41 (1st Cir. 1983); *Beazer* v. *New York City Transit Authority*, 558 F.2d 97, 100 (2d Cir. 1977), *rev'd*, 440 U.S. 568 (1979); *Cohen* v. *West Haven Bd. of Police Comm'rs.*, 638 F.2d 496, 505 (2d Cir. 1980); *New York State Ass'n for Retarded Children, Inc.* v. *Carey*, 711 F.2d 1136, 1153-54 (2d Cir. 1983); *Lindy Bros. Builders, Inc.* v. *American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 167-69 (3d Cir. 1973) (*Lindy I*); *Lindy Bros. Builders, Inc.* v. *American Radiator and Standard Sanitary Corp.*, 540 F.2d 102, 117-18 (3d Cir. 1976) (*Lindy II*); *Merola* v. *Atlantic Richfield Co.*, 493 F.2d 292, 298 (3d Cir. 1974); *Rodriguez* v. *Taylor*, 569 F.2d 1231, 1247 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978); *Graves* v. *Barnes*, 700 F.2d 220, 221-24 (5th Cir 1983); *Riddell* v. *National Democratic Party*, 712 F.2d 165, 169-70 (5th Cir. 1983); *Johnson* v. *University College*, 706 F.2d 1205, 1210-11 (11th Cir. 1983); *Northcross* v. *Board of Educ.*, 611 F.2d 624, 638-40 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980); *Louisville Black Police Officers Organization, Inc.* v. *City of Louisville*, 700 F.2d 268, 274-76, 279-81 (6th Cir. 1983); *Kamberos* v. *GTE Automatic Elec. Inc.*, 603 F.2d 598, 603-4 (7th Cir. 1979), *cert. denied*, 454 U.S. 1060 (1981); *Chrapliwy* v. *Uniroyal, Inc.*, 670 F.2d 760, 769-70 (7th Cir. 1982), *cert. denied*, 103 S.Ct. 2428 (1983); *In re Illinois Congressional Districts Reapportionment Cases*, 704 F.2d 380, 382-84 (7th Cir. 1983); *Avalon Cinema Corp.* v. *Thompson*, 689 F.2d 137, 139-40 (8th Cir. 1982); *White* v. *City of Richmond*, 713 F.2d 458, 461-62 (9th Cir. 1983); *Ramos* v. *Lamm*, 713 F.2d 546, 557-58 (10th Cir. 1983).

[37] *Hensley*, too, emphasized the importance of this factor. 51 U.S.L.W. at 4555.

[38] *Accord* A. Miller, *Attorneys' Fees in Class Actions*, at 10 (Federal Judicial Center 1980) (hereinafter "A. Miller"). Professor Miller recommended that fee awards compensate for contingency in a report to the Federal Judicial Center that was commissioned for the express purpose of investigating allegations of abuse in class action fee awards.

In contending that non-profit organizations undertaking civil rights litigation "cannot be said to have taken the risk of no remuneration,"[39] the State ignores the very real lost opportunity costs that are sustained by non-profit firms. Non-profit organizations like the Society are obliged to serve, on a wide variety of issues, as many as they can of the individuals eligible for their services who have meritorious cases. The Society operates with limited resources, substantially restricting its capacity to represent all the persons it is its purpose to serve. The investment of the substantial time and resources required to represent adequately the members of the *Stenson* class diverted those resources from the service of other eligible clients in other kinds of cases. In this case the very real "risk" thus existed that this considerable expenditure of time and resources would be for naught if the *Stenson* suit proved, as was not unlikely at the outset, either unsuccessful or of limited success.[40]

In addition, when payment of fees is significantly delayed over the life of lengthy litigation, an upward adjustment should

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[39] The State took just the opposite position when its own interests were at stake. *See* the 43-state *amici* brief in *Sangamo*, *supra*: "In choosing to pursue one antitrust action over another antitrust action, or any other type of action for that matter, the government attorney, like the private attorney, takes a significant risk with respect to success and ultimate recovery and experiences lost income potential resulting from allocation of limited attorney resources to the action pursued as opposed to another." *Amici* brief at 7.

[40] So viewed, the risk is the same for the Society as it is for profit-making firms. The risk that private firms assume when they undertake civil rights actions is that they will lose the opportunity to engage in fee producing actions because they have committed their resources elsewhere. The risk that the Society takes is that once a commitment is made to a particular § 1988 action, it is precluded from pursuing other of its special purposes, such as preventing evictions and mortgage foreclosures, assisting individuals in obtaining subsistence level public assistance benefits, and litigating adoptions and divorces. Failure to consider these opportunity costs violates the plain intent of Congress to place *all* attorneys, whether profit-making or non-profit, who successfully prosecute civil rights cases on a par in the awarding of attorneys' fees under § 1988, and serves to produce a windfall for defendants depending on the fortuity of who represents the successful plaintiffs.

be recognized to compensate for the value of the money lost over the years to inflation and foregone interest. Failure to compensate plaintiffs' attorneys for the lost value of their fee money, during a period of high inflation, would work a particular hardship on financially hard-pressed non-profit organizations like the Society which have experienced reduced funding from other sources.[41]

C. Congress Entrusted Calculation Of An Award Of Reasonable Attorneys' Fees To The Discretion Of The District Courts.

In *Alyeska*, this Court ruled that "the range of discretion of the courts in making [fee] awards [is a matter] for Congress to determine." 421 U.S. at 262. Congress responded to this challenge by adopting the lodestar/adjustment framework, and the *Johnson* factors. Within these guidelines, the calculation of an award of attorneys' fees under § 1988 was left to the informed discretion of the district courts. *See Hensley*, 51 U.S.L.W. at 4555, 4556. Congress' intent to entrust the task of setting a reasonable fee to the discretion of the district court, guided by

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[41] For this reason, many courts have taken the alternative approach of using current rather than historic rates in order to fully compensate plaintiffs' attorneys for their successful services. *E.g. Gautreaux* v. *Chicago Housing Authority*, 690 F.2d 601, 612-13 (7th Cir. 1982); *Chrapliwy* v. *Uniroyal, Inc.*, 509 F. Supp. 442, 457-58 (N.D. Ind. 1981), *aff'd in pertinent part*, 670 F.2d 760 (7th Cir. 1982), *cert. denied*, 103 S.Ct. 2428 (1983). Other courts have achieved the same result by adjusting the lodestar fee figure upward specifically to compensate plaintiffs' attorneys for the delay in the recovery of their fee. *E.g. Copeland* v. *Marshall*, 641 F.2d 880, 892-4, 906 n.61 (D.C. Cir. 1980) (*en banc*); *Lindy*, *supra*, 540 F.2d at 117. Adjusting the award to reflect the economic effects of delay in receipt of compensation promotes yet another purpose of § 1988. An adjustment for delay reduces the incentive to unnecessarily prolong litigation and thus deters defendants from taking advantage of plaintiffs' "tremendous disadvantage . . . in terms of finances and resources," *Northcross*, *supra*, 611 F.2d at 634. It would be grossly unfair in cases like this one to allow a defendant, by delaying the outcome, to realize savings in excess of $317,000 monthly, *see* n.90, *infra*, while at the same time to deprive plaintiffs' counsel of compensation for this same period of delay.

prior precedent and legislative history, and subject to appellate review, is emphasized repeatedly in the Committee Reports and the floor debates.[42] *See also Johnson*, 488 F.2d at 717, 720.

The wisdom, and the intended purpose, of the market-value approach to setting reasonable fees, for both non-profit and profit-making firms alike, is its inherent flexibility in the hands of experienced district court judges exercising their informed discretion.[43] The computation of a reasonable fee cannot be reduced to "mathematical precision," *Johnson*, 488 F.2d at 720—"[t]here is no micrometer of reasonableness," *Clark* v. *American Marine Corp.*, 320 F. Supp. at 712; *Davis*, 8 Empl. Prac. Dec. at 5049. The best, and the intended, gauge of the reasonableness of the fee is the considered judgment of the district court judge who presided over the case. *Trustees* v. *Greenough*, 105 U.S. 527, 537 (1881). The discretionary fixing of market-value billing rates thus provides a firm starting point from which then to measure the effect of the other *Johnson* factors on the setting of a reasonable fee.

In contrast, a cost-based approach to setting fees begins and ends the inquiry with consideration of only a single factor—the

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[42] *See, e.g.*, H. Rep., *supra*, at 6, 8 (the discretion of the district court is a "key feature" of the statute); 122 Cong. Rec. 31,851, 33,314 (1976) (statement of Sen. Kennedy).

The House debates also reflect that the corrective for excessive fee claims is the discretion of the district court judge and the availability of appellate review. 122 Cong. Rec. 35,116-17, 35,123, 35,127 (1976) (statements of Reps. Drinan and Jordan).

[43] In making an assessment of the value of the services rendered, the district court judge can take into account a number of relevant factors, including his own experience in setting market value rates in prior fee cases, the fees awarded in other comparable cases, his general knowledge of the fees charged by attorneys in the area, his own experience in the practice of law before assuming the Bench, specific evidence of the going rates for similar work in the community, and his personal familiarity with the attorneys' performance in the case. *See, e.g.*, *Monroe* v. *United Air Lines, Inc.*, 565 F. Supp. 274 (N.D. Ill. 1983); *Strama* v. *Peterson*, 561 F. Supp. 997 (N.D. Ill. 1983); *EEOC* v. *Sage Realty Corp.*, 521 F. Supp. 263 (S.D.N.Y. 1981); *Vecchione* v. *Wohlgemuth*, 481 F. Supp. 776 (E.D. Pa. 1979).

costs of providing the legal services—without consideration of any of the *Johnson* factors. Such an approach converts judges exercising traditional discretion in valuing the worth of an attorney's services into accountants analyzing complicated and competing cost philosophies. In the process, Congressional intent to leave the ultimate fee decision to the informed discretion of the district court is discarded.

D. The Award Of Fully Reasonable Fees Under The Lodestar Adjustment Approach To Non-Profit Law Firms Does Not Produce A "Windfall."

Congress, of course, did prohibit "windfall" awards under § 1988. The legislative history indicates, however, that Congressional disapproval of "windfall" awards was not directed against the awarding of fees computed at full market value to non-profit firms, but rather at preventing attorneys from becoming "rich"[44] or being unjustly enriched by compensation beyond the worth of the services provided. *Stanford Daily*, 64 F.R.D. at 687. (Attorneys must be compensated "only for their [own] contribution to the litigation.") The market-value approach prevents windfalls by not automatically accepting a lawyer's customary charge, but instead setting a reasonable market rate in light of the nature of the services rendered. *See, e.g., Avalon Cinema Corp.* v. *Thompson*, 689 F.2d 137, 140 (8th Cir. 1982).

No inference can fairly be drawn from the legislative history of § 1988 that Congress viewed as a "windfall" a full market-value award to a legal services or public interest firm that goes, not to the attorneys whose work is compensated, but to maintaining or possibly expanding the provision of services to eligible clients and to advancing civil rights causes that Congress intended to promote by enacting § 1988.[45] A fully com-

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[44] *See* 122 Cong. Rec. 31,851 (1976) (statement of Sen. Kennedy).

[45] On the contrary, the legislative history contains clear expressions of concern about funding for non-profit organizations. 122 Cong. Rec. 35,127 (1976) (statement of Rep. Holtzman); 122 Cong. Rec. 35,123 (1976) (statement of Rep. Drinan); H. Rep., *supra*, at 2-3. Moreover, it must be empha-

pensatory award of attorneys' fees to a private firm that advances its institutional goals, including the realization of a profit and subsidization of high overhead, does not become a "windfall" when granted to a non-profit firm to serve its public interest purposes.[46]

Indeed, the awarding of less than full market-value fees to non-profit firms would result in a clear windfall to defendants depending on the fortuity of the identity of the attorneys representing the prevailing plaintiff. *Copeland* v. *Marhshall*, 641 F.2d 880, 899 (D.C. Cir. 1980) (*en banc*); *Palmigiano* v. *Garrahy*, 616 F.2d 598, 602 (1st Cir.), *cert. denied*, 449 U.S. 839 (1980); *Dennis* v. *Chang*, 611 F.2d 1302, 1307 (9th Cir. 1980); *Ramos* v. *Lamm*, 713 F.2d 546, 552 (10th Cir. 1983).

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sized that no law or regulation forbids a non-profit organization from earning more than it has expended on any activity related to its exempt charitable purposes, as long as the excess is used to further those purposes. The term "non-profit" refers to the status of a civil rights or other public interest organization under § 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3). Under this statute, a tax-exempt civil rights organization is required to be "non-profit" in the sense that none of its income may inure to the benefit of any of its officers or employees, other than as reasonable compensation for services performed, and all of its income must be used for its exempt charitable purposes. *See* 26 C.F.R. §§ 1.501(c)(3)-1(b)(4), 1.501c(3)-1(c)(2). The Internal Revenue Service has expressly recognized the propriety of receipts of fee awards by tax-exempt organizations, whether providing legal services to the poor (like the Society), or functioning as "public interest law firms" under Rev. Proc. 71-39, 1971-2 C.B. 575, *amplified*, Rev. Proc. 75-13, 1975-1 C.B. 662. (The Society is not a "public interest law firm" under the I.R.S. definition. *See* I.R.S. Publication 557 at 12.) Similarly, regulations promulgated under the Legal Services Corporation Act recognize that federal funds can be used, under defined circumstances, for cases where fee awards are available and that organizations receiving these funds are not precluded from such representation. *Rodriguez* v. *Taylor*, 569 F.2d 1231, 1246 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978); 45 C.F.R. §§ 1609.3-1609.5.

[46] *See* Berger, *Court Awarded Attorneys' Fees: What is "Reasonable"?*, 126 U. Pa. L. Rev. 281, 323 (1977); *Accord* A. Miller, *supra*, at 9-10.

II. ADOPTION OF A COST-RELATED OR MODIFIED COST-RELATED FORMULA WOULD BE UNWORKABLE AND INAPPROPRIATE, GENERATE LENGTHY AND COMPLEX LITIGATION, AND CREATE SERIOUS DISINCENTIVES TO REPRESENTATION OF CIVIL RIGHTS PLAINTIFFS

Reliance on cost-accounting as the underpinning for fee awards would inevitably spawn the "second major litigation" that *Hensley*, 51 U.S.L.W. at 4555, cautioned against. Experience in the regulatory rate-setting area teaches that cost issues are difficult even for the specialized agencies, lead to lengthy evidentiary proceedings, and pose a substantial problem for the reviewing courts.[47] Under the State's proposed cost approach, the courts would shoulder the heavy burden of resolving complicated cost issues, in an area devoid of generally accepted accounting principles, without guidance from a regulatory body to whose expertise deference could be given.[48]

Great weight is due the overwhelming rejection of a cost approach by the District of Columbia Circuit *en banc* in *Copeland III*. Here, the Circuit Court most experienced in overseeing cost-based regulatory rate-setting was deterred by the complexities in concept and application that a cost approach

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[47] *See, e.g., Anaheim, Riverside, etc.* v. *Federal Energy Regulatory Commission*, 669 F.2d 799 (D.C. Cir. 1981); *Cleveland-Cliffs Iron Co.* v. *Interstate Commerce Commission*, 664 F.2d 568, 580-87 (6th Cir. 1981); *Cities of Batavia, et al.* v. *Federal Power*, 548 F.2d 1056 (D.C. Cir. 1977). Further, the difficulties of measuring costs have been decried as "notorious" and cost allocations deemed "inevitably arbitrary" in the antitrust area. *See, e.g.*, Areeda and Turner, *Antitrust Law*, ¶ 715.2 (Supp. 1982).

[48] This Court has often commented on the unsuitability of the courts for resolving these issues and the desirability of deferring to expert administrative tribunals for solutions. *E.g., American Commercial Lines* v. *Louisville & Nashville R. Co.*, 392 U.S. 571, 586 n.16 (1968); *Atchison, Topeka & Santa Fe Railway Co.* v. *Wichita Bd. of Trade*, 412 U.S. 800, 806 (1973).

would entail.[49] Other courts, as well, have recognized these problems in rejecting a cost approach. *See* Point IA3, *supra*.

There are not as yet (any may never be) uniform standards governing the application of cost-accounting techniques to law firms.[50] Many if not most firms will never need to address cost-accounting issues. Cost figures used for income tax purposes neither reflect the total economic costs of an enterprise[51] nor help in allocating costs to particular activities or individuals in ways which would achieve the ostensible goals of a cost-based fee approach.[52]

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[49] 641 F.2d at 896:

> We fear that the proposed "cost-plus" method of calculating fees would indeed become the inquiry of "massive proportions" that we strive to avoid. The problems associated with administering a "cost-plus" calculus are multifarious. How might a firm allocate its overhead costs to a particular piece of litigation? In what manner does one calculate the costs associated with the "imputed salaries" of firm partners? What is a "reasonable" profit to be awarded? The necessity, under "cost-plus," of answering these and other questions creates the specter of a monumental inquiry on an issue wholly ancillary to the substance of the lawsuit.
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> To address questions like these, considerable discovery would be necessary to obtain documentary evidence. A law firm's financial structure is highly relevant to a "cost-plus" inquiry, so the firm's financial records would be discoverable. Third-party and expert testimony would have to be proffered. Because time spent litigating the fee request is itself compensable, the depth of the inquiry ironically might lead to an *increase*, rather than a diminution, in fee awards. (Footnotes omitted)

[50] The Cost Accounting Standards Board took almost a decade to promulgate uniform cost accounting standards for defense contractors. *See* 4 C.F.R. Chapter III.

[51] *Cf. Federal Power Comm'n* v. *Memphis Light, Gas and Water Division*, 411 U.S. 458, 460 (1973) (holding it is appropriate to use accelerated depreciation methodology to determine cost-base even though a different cost methodology is employed for tax purposes).

[52] Historically, law firms have not attempted cost-accounting on a per department, per specialty, per matter or per lawyer basis. It is only recently that experimental use of cost accounting techniques as a possible aid to law firm decision-making, particularly with respect to long term planning, has begun to be discussed in the profession. *See, e.g.*, Rabenhorst, *Using Cost Accounting Techniques*, Nat.L.J., May 3, 1982, at 16.

The problems of applying a cost standard to either a profit-making or non-profit law office are myriad. For example, it is first necessary to decide which activities, organizational units or individuals should bear the cost allocations.[53] Next, it must be determined which costs are properly chargeable to a particular litigation.[54]

Numerous other questions are raised as to the propriety and feasibility of passing various items of overhead along to a losing defendant in a particular case.[55] To list just a few: Are uncollected or uncollectable fees in other matters an appropri-

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[53] This issue raises such questions as: Should the allocation be done for the particular litigation, for a category of litigations, for a particular department or division, or for the individual litigators who have worked on a matter? Should different cost allocations be done for partners and associates in private firms? Should different allocations be done for supervisory and nonsupervisory attorneys? Are cost allocations to be done for particular activities which are components of litigation? For a discussion of the problems that arise out of cost allocations, and the multiple solutions available, *see Cleveland-Cliffs Iron Co.* v. *I.C.C.*, 664 F.2d 568, 580-86 (6th Cir. 1982).

[54] The threshold issue of whether to use full absorption costing or direct costing must be resolved. These are two traditional approaches to cost-allocation which yield drastically different results. Full absorption costing aims to allocate all costs—fixed and variable—to units of output. Direct costing allocates only variable costs. Davidson, Stickney and Weil, *Financial Accounting: An Introduction to Concepts, Methods and Uses* 699, 719 (3d ed. 1982). Accountants recognize that the allocation of indirect or overhead costs to specific products or departments is essentially arbitrary. *Id.* at 731 (see definition of "indirect costs"). *See Aeronautical Radio, Inc.* v. *Federal Communications Comm'n*, 642 F.2d 1221, 1228-30 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 920 (1981), for some issues raised by this controversy.

[55] Are continuing professional education costs appropriately included in overhead? Recruitment costs? Business development costs? Costs of fund raising? *See Rochester Gas and Elec. Corp.* v. *Public Service Comm'n*, 51 N.Y.2d 823 (1980), *appeal dismissed*, 450 U.S. 961 (1980).

ate component of overhead?[56] How can an imputed salary figure for partners in firms be derived?[57]

Another dimension is added to the problem when efforts are made to allocate costs per attorney hour. There is no simple solution to this problem. Enormous difficulties and inequities result from using either the individual attorney's actual work hours, or, as suggested by the State, court-promulgated schedules of average work hours. While the number of hours that the attorney worked on the litigation underlying the fee application are known, what percentage of the attorney's work year do these hours constitute? For private attorneys, the State would use "billable" hours.[58] For non-profit attorneys, the State argues that since they do not bill their clients, resort must be had to average billable hours of private attorneys. Judge Newman, in discussing a possible cost approach, *Willowbrook*, 711 F.2d at 1151, used, without definition, the

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[56] *See Transcontinental Gas Pipe Line Corp.* v. *Federal Power Comm'n*, 518 F.2d 459 (D.C. Cir. 1978). If such fees are included in overhead for the private firm, is there any rationale for excluding costs of non-fee generating matters from the non-profit firm's overhead?

[57] Does this methodology work for large and small firms? What account does it take of differing compensation patterns based upon use of the partnership or professional corporation form? How does it treat deferred compensation, fringe benefits and pensions? How can imputed salaries be calculated for sole practitioners? More generally, how can accounting differences caused by different legal structures of private firms (*e.g.*, partnerships, professional corporations, partnerships including professional corporations) be factored out? How can the differing treatment of various cost items (*e.g.*, cost items treated as partnership expenses by some firms but expenses of individual partners by others) be handled?

[58] However, billable hours do not accurately measure work hours and are not defined in the same way by all firms. In addition, substantial working time, often recorded as "nonbillable," is associated with widely varying *pro bono* activities (*e.g.*, civil rights litigation, philanthropic boards and bar association committees) and other firm business (*e.g.*, department and committee meetings, recruitment, business development, continuing legal education).

concept of actual "productive" hours for non-profit attorneys, rather than average hours.[59]

Defining "billable" or "productive" hours for purposes of salary and overhead allocation in an equitable manner that makes sense for both private and non-profit firms is a difficult task.[60] If the number of annual billable hours is overstated, as it

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[59] If "productive" hours are defined as client matter-related time, and the correct exercise is to divide attorney's annual salary and associated percentage of overhead by his total number of hours per year, then a senior supervisory attorney who spends only a few hours per year on cases could have a cost per hour in the thousands of dollars. If "productive" hours are more broadly defined to include supervisory and administrative functions and continuing legal education, then the cost per hour falls. It falls, however, because of the inclusion of areas of activity that would be deemed "nonbillable" by private firms. If such activities must bear a percentage of salary and overhead for non-profit firms, then they should be similarly treated by private firms. Under the State's approach, however, this would not occur. There is no reasoned basis for this difference in treatment and no obvious solution to this quandary. If private attorneys are forced to allocate salaries and overhead to nonbillable activities, their compensation for billable hours drops dramatically, with an obvious impact on their willingness to represent civil rights plaintiffs.

[60] Only three officially reported district court decisions have attempted to apply a cost approach. They demonstrate some of the problems inherent in the billable hour concept. In *Alsager* v. *District Court of Polk County*, 447 F. Supp. 572, 577 (S.D. Iowa 1977), the court, without explanation, "estimated 1600 billable hours in a year" and multiplied fractions corresponding roughly to the attorneys' time input on the case times their annual salary. In *Glover* v. *Johnson*, 531 F. Supp. 1036 (E.D. Mich. 1982), the court arrived at the actual annual billable hours worked by the two non-profit attorneys in question: 1066 and 1379 hours respectively. The attorney with the lower billable hours reached that number by deducting a 25% factor from her total hours worked for nonbillable "coordination and information dissemination," training activities and "down time." In 1981, when her salary was $21,000, the cost of her time and the associated overhead was placed at $110.34. The court had occasion to determine the market value of her services that same year when she continued work on the case after leaving for private practice: The reasonable market value for an individual with her skills and expertise in the Detroit area was pegged at $75. (The second attorney's 1981 salary was $30,786.34 and the hourly cost of her services and overhead was $73.83.) *Page* v. *Preisser*, 468 F. Supp. 399 (S.D. Iowa 1979) was by the same judge as *Alsager* and used the same standard.

is in the United States *amicus* brief, the cost per hour plummets.[61] Alternatively, depending upon categorization of various work activities, the result sometimes may be cost-based rates which exceed the market value of the services rendered, even absent any profit factor. If the courts must scrutinize the results of a cost analysis to ascertain that rates not in excess of market are being charged, then an additional time-consuming step is introduced into the fee-setting process. The dubious benefits of this exercise do not justify the substantial costs—costs which, in any event, would ultimately be borne by the losing party.[62]

In addition to difficulties in defining and allocating costs, the cost-based approach requires the district court to fix a reasonable profit. Again, this is not a simple matter either in concept or application. Calculation of a profit factor would impose on district court judges the inappropriate task of fixing fair rates of return and defining rate bases.[63]

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[61] The Government alleges that "the average cost . . . of . . . Department of Justice legal services . . . ranged from $27.48 . . . to $48.28 . . . per hour . . ." (Brief for the United States at 29.) The Government fails to disclose that its figures are based upon a totally artificial work calendar consisting of 52 full work weeks amounting to 2080 productive hours. *See Copeland* v. *Marshall*, 641 F.2d at 912, n.10 (Willey, J., dissenting). A true picture of the hourly cost of the legal services can only be obtained when non-productive time such as vacations, holidays, lunch hours, sick days and other unavoidable absences and time spent on activities not directly involved in providing legal services such as training, supervision, legal reading, office and departmental meetings and recruitment are removed from the equation. Without considering these factors, the Government has significantly understated its costs. Moreover, neither the method used to calculate total costs, nor the year in which the figures were obtained (they were reported to the *Copeland* court in December 1979) are revealed. Another problem is that dedicated attorneys who work longer hours would receive lower fees per hour.

[62] It should also be noted that the State's cost-based formulations penalize productivity and reward inefficiency. *See Western Coal Traffic League* v. *United States*, 677 F.2d 915, 929-31 (D.C. Cir. 1981), *cert. denied*, 103 S.Ct. 210 (1983).

[63] Difficulties in assessing the base and an appropriate rate of return are reflected in *Cleveland-Cliffs Iron Co.* v. *I.C.C.*, *supra*, 664 F.2d at 583-84,

The cost-based approach not only suffers from serious conceptual and practical difficulties, but also significantly undermines Congressional intent by deterring representation of civil rights plaintiffs.[64] It would require private attorneys to reveal their partnership profits, salary structures, costs, records and internal practices to the scrutiny of opposing counsel representing both public and private defendants. It would also require attorneys to create data sufficient to establish their hourly costs. Since this data would be developed solely for the purpose of fee litigation, the likelihood of controversy over its accuracy would be great. Thus, there is a strong probability that private attorneys would withdraw from civil rights litigation rather than undertake the cost accounting studies required and then open their books to their adversaries.[65]

The use of average cost data to preserve confidentiality and simplify fee award litigation is not an adequate safeguard. If the averages were determined on a case-by-case basis, this would invariably lead to voluminous discovery and evidentiary hearings. The State's suggestion that averages (presumably of costs, including attorney salaries, as well as of "billable" or "productive" hours) be promulgated by the courts leaves unanswered the question of where and how these figures are to be obtained and embarks the courts on data collection and regulatory enterprises wholly inappropriate to their adjudicatory

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586-87; *Consolidated Edison* v. *Public Service Comm'n*, 74 App. Div. 2d 384, 428 N.Y.S.2d 343 (3d Dep't 1980).

[64] Significantly, the Equal Employment Opportunity Commission (E.E.O.C.), the Federal agency with responsibility for enforcement of Title VII of the Civil Rights Act, has concluded that replacement of the market value approach with a cost related approach would "substantially deter private counsel from representing employees challenging private and public employment practices and thereby frustrate enforcement of Title VII . . ." Supplemental Brief of the E.E.O.C., *Amicus Curiae*, on *Rehearing En Banc* at 2 *Copeland* v. *Marshall*, No. 77-1351 (D.C. Cir., Sept. 1979).

[65] Deterrence of private attorneys will also have a spillover effect on civil rights organizations that rely on private cooperating attorneys throughout the country. Congress was well aware of this practice. *See Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 66 F.R.D. 483 (W.D.N.C. 1975), cited in S. Rep., *supra*, at 6.

function. If the logical justification for a cost-based approach is to compensate actual expenditures, the use of averages fatally undermines this concept.

In sum, all the proposed variants of a cost-related approach to calculating § 1988 fee awards share a host of disadvantages: (1) they utterly fail to implement the intent of Congress; (2) they inevitably generate a myriad of complex and unmanageable cost-accounting questions; (3) they would divert the time of the district courts to inappropriate tasks of rule-making and selecting among competing cost-accounting philosophies; (4) they would entail another round of major litigation; (5) they would generate tremendous disincentives to the litigation of civil rights cases by private and non-profit firms; and (6) they would promote inefficiency and waste by encouraging the pass-through of costs without regard to the value of the services provided. Furthermore, unless § 1988 is to be singled out for disparate treatment, the same problems would burden fee awards made pursuant to more than a hundred statutes and the newly strengthened sanction provisions of the Federal Rules. The market value approach, on the other hand, honors the intent of Congress and is burdened by none of the infirmities described above. That approach places the task of awarding reasonable fees where Congress wanted it left—with the discretion of the District Judge who has in-depth knowledge of the case before him and experience in valuing the worth of attorneys' services. As Congress intended, the corrective for excessive fee requests within the market-value framework is the informed discretion of the court, subject to appellate review.[66]

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[66] If this Court were to conclude that the setting of market-value billing rates at the high end of the market is generally inappropriate, then district courts could be cautioned ordinarily to look at the middle of the market. *Cf. EEOC* v. *Sage Realty Corp.*, 521 F. Supp. 263, 269-70 (S.D.N.Y. 1981). Concerns about isolated cases of unduly high awards cannot justify the repeal of Congressional intent to entrust to the district court's discretion the setting of market-value rates, and the substitution of an unintended and unworkable cost-related standard.

III. ANALYSIS OF FEE AWARDS UNDER § 1988 DEMONSTRATES THAT THE LOWER FEDERAL COURTS HAVE EMPLOYED PROPER STANDARDS AND AWARDED REASONABLE AMOUNTS

No valid empirical support exists for the State's claim that § 1988 fee awards are inflated or wildly disparate.[67] On the contary, a study undertaken by respondents documents the fact that § 1988 fee awards have been reasonable, moderate, and based upon proper exercise of judicial discretion.[68] To get an accurate picture of how the lower courts are exercising their

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[67] Conspicuously absent from the conclusory claims made by New York, the 40 states that filed *amicus* briefs, and the Brief for the United States, is evidence of the allegedly high cost of § 1988 fee awards. See especially Brief for Petitioner, p. 11. n.**

The State's sole basis for its contention that awards under § 1988 are unreasonably high and unpredictable is a flawed survey of 56 civil rights cases decided between 1974 and 1979 which does not support the proposition asserted. Brief for Petitioner, p. 16, citing Comment, *Calculation of a Reasonable Award of Attorneys' Fees Under the Attorneys' Fees Award Act of 1976*, 13 J. Mar. L. Rev. 331, 378 n.234 (1981). The claimed 685% variation in fee awards in those cases was between the highest ($137.50) and lowest ($20.00) hourly rates awarded during that period.

Although this survey is methodologically suspect (notably, it gives no indication of the basis for selecting these cases), it still buttresses respondent's view that fee awards under § 1988 are overwhelmingly moderate. First, and typical of many of the cases cited in the survey, the highest hourly rate awarded ($137.50) occurred in a case where only a fraction of the total hours expended was compensated at that rate. *Northcross* v. *Board of Educ.*, 611 F.2d 624, 641-42 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980). Second, of the 56 cases surveyed, only five awarded a highest hourly rate of over $75.00. 13 J. Mar. L. Rev. at 378 n.234.

In any event, variation in fees to reflect differences in geographic area, complexity of litigation, length of litigation, experience and ability of the attorneys, year of the award, etc., is an intended result of the *Johnson* standards and an anticipated consequence of leaving the matter to the discretion of the district court.

[68] Since the lower courts have shown themselves to be fully capable of preventing abuses in civil rights fee awards, adoption of the rigid standards suggested by the State (Brief for Petitioner, p. 49) would unnecessarily interfere with their discretion.

discretion in making fee awards, respondent surveyed a broad sample of recent attorneys' fees decisions under § 1988.[69]

The survey demonstrates that fee awards under § 1988 have been moderate, typically ranging betwen $50 and $80 per hour. Trial courts often reduce fee requests, by reducing the total hours requested, the hourly rates requested, or both. Moreover, the survey shows that adjustments to the lodestar are relatively rare, are sometimes downward, and are generally modest.

In over 81% of the cases containing the relevant data, the trial court reduced the total hours requested, the rates requested, or the total award requested.[70] In the 56 cases in which an average hourly rate could be ascertained, only 18 were over $75. Only 19 cases involved adjustments to the lodestar; and two of these were downward adjustments. Of the upward adjustments, seven exceeded 25 percent, and four were 50 percent or more.[71]

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[69] The results of this survey, in tabular form, are lodged as Appendix 3. Specifically, respondent examined all cases appearing in the headnotes to § 1988 in the pocket part and supplement of the United States Code Annotated. 42 U.S.C.A. § 1988 (Supps. 1983 and June 1983). Respondent thus reviewed approximately 325 officially reported cases decided mostly from 1981 to the present. Of this number, 73 opinions contained data sufficient to ascertain one or more of the following: (i) the average hourly rate awarded; (ii) the range of hourly rates awarded; (iii) the number of hours requested by the fee applicant, and the hours compensated by the court; and (iv) the total award requested by the fee applicant, and the award granted by the court. Most of the remaining cases in the sample either limited discussion to various legal issues under § 1988, stated a total award without indication of the manner in which it was computed, or noted that reasonable attorneys' fees would be awarded upon further proceedings.

[70] In 71 of the cases surveyed the opinions indicated whether the hours, rates or lodestar requested were reduced by the trial court. In 58 of these cases the trial court reduced the request. *See* Appendix 3.

[71] Moreover, the sample of cases examined by respondent indicates that appellate courts vigorously review trial court fee awards. Courts of appeals are not reluctant to modify or remand fee award cases, and do so where the number of hours compensated is considered excessive, *e.g.*, *Herrera* v.

The reasonableness of § 1988 fee awards generally, as well as in this case, is even more apparent when compared with awards under other federal attorneys' fees statutes. Published surveys of fee awards in antitrust and securities cases indicate hourly rates far in excess of those under § 1988. A 1980 survey of 186 antitrust and securities cases revealed that the average hourly rate before adjustment was $92.50, that the average adjustment was 78%, and thus that the average hourly rate after adjustment was $162.89.[72] More recent surveys indicate similar high awards.[73] This marked disparity between fee awards in civil rights and antitrust cases has been shown by

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Valentine, 653 F.2d 1220 (8th Cir. 1981); where the hourly rates are deemed too generous, *e.g.*, *Green* v. *Francis*, 705 F.2d 846 (6th Cir. 1983), or too parsimonious, *e.g.*, *Gurule* v. *Wilson*, 635 F.2d 782 (10th Cir. 1981); where an upward adjustment is considered unwarranted, *e.g.*, *Strama* v. *Peterson*, 689 F.2d 661 (7th Cir. 1982); where the trial court erred in evaluating the extent to which plaintiff prevailed, *e.g.*, *Lanner* v. *Wimmer*, 662 F.2d 1349 (10th Cir. 1981); where the trial court's opinion indicates inadequate scrutiny of the various factors which make up a fee award, *e.g.*, *Pilkington* v. *Bevilacqua*, 632 F.2d 922 (1st Cir. 1980); or, most often, where the record insufficiently indicates the basis for the trial court's fee award, *e.g.*, *Bartholomew* v. *Watson*, 665 F.2d 910 (9th Cir. 1982); *Freeman* v. *Franzen*, 695 F.2d 485 (7th Cir. 1982); *Brown* v. *Bullard Indep. School Dist.*, 640 F.2d 651 (5th Cir.), *cert. denied*, 454 U.S. 828 (1981).

[72] *Attorney Fee Awards in Antitrust and Securities Class Actions*, 6 Class Action Reps. 82, at 122-27 (1980).

[73] *Attorney Fee Awards in Antitrust Class Actions*, 7 Class Action Reps. 167 (1981) (average hourly rates before adjustment ranging from $71.64 - $132.50); *Attorney Fee Awards in Securities Class Actions*, 7 Class Action Reps. 299 (1982) (average hourly rates before adjustment ranging from $77.12 - $162.50); H. Newberg, *Newberg on Class Actions* §§ 7025-30 (Supp. 1983).

statistical study,[74] and has been noted by a commentator who criticized this "public interest discount."[75]

The reasonableness of § 1988 awards is further emphasized by comparison with published compilations of law firm billing rates. One survey of billing rates as of 1980-81 reveals, for a sample of 44 large New York firms, an average lowest associate billing rate of $66.58 and an average highest partner rate of $231.86.[76]

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[74] An unpublished 1975 survey of 140 district court cases revealed that the mean hourly rate awarded under private antitrust stattues was $181, while the mean hourly rate awarded under Title VII was $37. Helfman, "Court Awarded Attorneys' Fees: A Statistical Survey of One Hundred and Forty Recent District Court Cases Involving Attorneys' Fees." (Project Submitted to the Faculty of Antioch School of Law, 1975), cited in Berger, *Court Awarded Attorneys' Fees: What is "Reasonable"?*, 126 U. Pa. L. Rev. 281, 310 (1977).

[75] Berger, *supra*, 126 U. Pa. L. Rev. at 290, 310. The disparity generally between fee awards to non-profit and private attorneys has also been noted and criticized in a report prepared for the Federal Judicial Center. A Miller, *supra*, at 367-68.

[76] *The American Lawyer Guide to Law Firms 1981-82* (1981) (the "1981 Guide"). This first edition of the Guide contained data for 172 firms in 13 cities. The 1983-84 edition includes 234 firms in 20 cities. This is a readily available source for accurate current billing rate information that can be used in assessing the reasonableness of fee applications in various communities. The importance of examining the reasonableness of fee awards on the basis of local rates is highlighted by regional disparities disclosed by the 1981 Guide: *e.g.*, for Atlanta, the average lowest associate billing rate was $50.56 and the average highest partner rate was $155; for Denver, $50 and $127 respectively; for Houston, $56.67 and $193.33; and for Los Angeles, $63.57 and $197.50. Also, these are billing rates generally charged to the firms' regular clients who typically pay on a monthly or quarterly basis. They take no account of contingency or other special factors, such as "the amount involved, the result, and the time pressure" in billing clients, "particularly for complex litigation," on the basis of which firms frequently charge higher amounts. *Id.* at 743.

IV. IN THE DISTRICT COURT, THE STATE WAIVED ITS CURRENT CHALLENGES TO THE FEE AWARD; IN ANY EVENT, THE AWARD WAS BASED UPON APPLICATION OF THE PROPER STANDARDS AND FALLS WELL WITHIN THE COURT'S DISCRETION

The State's present focus on the need for radically new standards to guide the district courts in evaluating fee applications is a transparent attempt to divert attention from its own decision to forfeit its right to discovery or testimony in the trial court with respect to the basis for the Society's fee application. Having chosen to forego the time-tested adversary process for resolving its concerns, the State now chooses to posit in the abstract objections to allegedly excessive hours and duplicative efforts. Had these objections been timely raised in the District Court, plaintiffs could easily have laid them to rest. However, the State is in no position at this late date to claim that documentation of the Society's fee request was incomplete or inaccurate. *Hormel* v. *Helvering*, 312 U.S. 552, 556 (1941); *Copeland* v. *Marshall*, 641 F.2d at 905. It is likewise in no position to withdraw its concession in the District Court that market-value sets the standard for fees under § 1988.

In any event, the District Court's award was well within its discretion. Based upon his day-to-day monitoring of this litigation, the District Judge was intimately familiar with its progress throughout the pleading, discovery, liability and enforcement stages. He observed, firsthand, the proficiency of counsel in court, and read and evaluated their written submissions. *See Johnson*, 488 F.2d at 718. His conclusions concerning the value of the services rendered are therefore in the nature of findings of fact, affirmed by the Court of Appeals, and should not be disturbed in the absence of an obvious and exceptional showing of error.[77] While the fees awarded may be at the upper end of the market for awards under § 1988 they are certainly

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[77] *Hensley*, 51 U.S.L.W. at 4556; *Maher* v. *Gagne*, 448 U.S. 122, 130 (1980), citing *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949); *Trustees* v. *Greenough*, 105 U.S. 527, 537 (1881).

not the highest, and do not constitute such a departure from prior awards in similar cases as to constitute an abuse of discretion.

The Lodestar

In arriving at a reasonable fee award in this case, Judge Sweet correctly placed primary reliance on awards in cases of similar complexity and difficulty[78] and on his own familiarity with the range of rates charged for similar services in New York City.[79] Based upon these factors, and upon his finding that "[t]he quality of work performed by counsel throughout this case was high" (JA 355), the District Judge awarded reasonable hourly rates of $95, $100 and $105 per hour.[80]

The reasonableness of these rates is amply demonstrated by comparison with the awards explicitly approved by Congress in *Stanford Daily*, *Davis*, *Swann* and *Torres* v. *Sachs*. In *Stanford Daily*, the court awarded fees of $50 per hour for work done between 1971 and 1974. 64 F.R.D. at 685. In 1981 dollars, this award is equivalent to an hourly rate of $89.59.[81]

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[78] Awards in similar cases is one of the 12 *Johnson* factors. 488 F.2d at 719.

[79] Congress indicated its approval of this approach by its citation of *Stanford Daily* for correct application of the proper standards. The award in that case was based upon the court's experience with rates charged by other attorneys in the area for work involving similarly complex questions. 64 F.R.D. at 684-85. District Judges unquestionably have familiarity with the range of billing rates in the community and are presumed to be expert on the question of reasonable rates, *Lindy I*, 487 F.2d at 169. Accordingly, Professor Miller has recommended that in determining a reasonable hourly rate, "[j]udges should rely heavily on their own experience and on rates requested and awarded in other cases. . . ." A. Miller, *supra*, at 9.

[80] These hourly rates reflect 2½ years of high inflation between the beginning of this litigation and the fee award.

[81] These figures were obtained by applying the increase in the Consumer Price Index between the month of the fee award to which reference is made and March 1981, the month of the fee award herein. The chart used, Consumer Price Index for Urban Wage Earners and Clerical Workers, U.S. City Average, All Items, was obtained from the U.S. Dept. of Labor, Bureau of Labor Statistics. All conversions into "1981 dollars" in this section were computed in the above manner.

The *Davis* rates were $35, $55 and $60 for services provided in 1973. 8 Empl. Prac. Dec. ¶ 9444 at 5047 (*see also* 7 Empl. Prac. Dec. ¶ 9088). This is the equivalent of 1981 rates of $63.18, $99.29 and $108.31, respectively. 66 F.R.D. at 486. *Swann* noted that, in 1975, hourly rates in federal court ran from $30 to $105. In 1981 those rates equalled between $50.06 and $177.14.[82]

Compelling support for the reasonableness of these rates is also found in *Torres* v. *Sachs*, 69 F.R.D. 343 (S.D.N.Y. 1975), *aff'd*, 538 F.2d 10 (2d Cir. 1976), which was approved by Congress and cited by Judge Sweet. In *Torres*, non-profit attorneys in New York City who had 4½, 3½ and 1½ years of experience when the litigation was commenced, and 6½, 5½ and 3½[83] years of experience when it ended, were awarded fees of $75, $50 and $50 per hour, respectively. These fees amount to hourly rates of $120.11, $80.07 and $80.07 in 1981 dollars.[84]

Adjustment To The Lodestar[85]

The issues raised in this case were novel, having never before been litigated in any court in the United States. The

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[82] It is noteworthy that the rates for legal services in the communities in those cases are not as high as in New York City. *See EEOC* v. *Sage Realty Corp.*, 521 F. Supp. 263, 270 (S.D.N.Y. 1981).

[83] The State places primary emphasis on the "limited" experience of plaintiffs' counsel in asserting that the instant hourly rates are high. Brief for Petitioner, pp. 6, 21. Of course, the experience, reputation and ability of the attorneys must be considered in setting the hourly rate. However, longevity, *per se*, is not the decisive factor. "If a young attorney demonstrates the skill and ability, he should not be penalized for only recently being admitted to the bar." *Johnson*, 488 F.2d at 719.

[84] The ages, experience and expertise of the attorneys in *Torres* v. *Sachs* are close to those of the attorneys herein.

[85] The State's present objections to the 50 percent upward adjustment of the lodestar figure should not even be considered by this Court, since they were not raised in the District Court. *See* Defendant's Fee Memorandum, pp. 14-15. *See Terkildsen* v. *Waters*, 481 F.2d 201, 203-04 (2d Cir. 1973). The State's only objection in the District Court to the requested upward adjustment of the lodestar was that the award must be made from State funds. Defendant's Fee Memorandum, pp. 14-15; JA 358.

litigation was extremely complex. Its argument and resolution required a detailed analysis of numerous sources of law, as well as various governmental interpretations of them, none of which directly addressed the unique situation presented.[86] JA 152-64 *supra*. In obtaining practically complete relief for the plaintiff class,[87] plaintiffs have furthered the express purposes of Title XIX of the Social Security Act and 42 U.S.C. § 1983. Indeed, the total fee award of $118,968.00 is dwarfed by the windfall realized by the State through its illegal practices. By the most conservative of estimates, the State improperly withheld over $11 million in Medicaid benefits between January 1, 1977 and November 30, 1979, almost $317,000 each month.[88]

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[86] This litigation has led to successful challenges, based upon the District Court's decision herein, to identical practices in other states. *See Massachusetts Ass'n of Older Americans* v. *Sharp*, 700 F.2d 749, 752-54 (1st Cir. 1983). *See also Chu Drua Cha* v. *Noot*, 696 F.2d 594, 602 (8th Cir. 1982). The difficulty of the issues presented below is further reflected by the fact that at least one court has disagreed with the District Court's analysis in this case. *See Cripper* v. *Dempsey*, 549 F. Supp. 643 (W.D. Mich. 1982).

[87] The State attempts to trivialize the relief obtained in this litigation by implying that only 1% of the 129,258 people sent notices as a result of this litigation benefitted thereby. Brief for Petitioner, p. 34, n.*. This is a gross distortion of the facts. That same survey reveals that 5,170 individuals were restored to Medicaid benefits as a result of this action. See Harvey-Cook Affidavit, Summary of Findings. The State also fails to mention that the reason why the vast majority failed to respond to the notice was because they had died, moved, or been reinstated to Medicaid benefits for other reasons. *See* JA 232-33, 217-218. Most significant, however, is the State's failure to acknowledge the prospective benefits of the District Court's injunction.

[88] The extent of this relief also sheds some light on the State's tenacious defense. Between January 1, 1977 and November 30, 1979, the State illegally terminated the Medicaid benefits of 113,688 individuals. *See* n.6, *supra*. Assuming that these individuals were improperly denied Medicaid benefits for as little as one month each, the net savings to the State was $316,924 per month. This conservative estimate is based upon the average monthly Medicaid expenditures, exclusive of costly home care service, for S.S.I. recipients in New York City between January and July 1981. *See* Use of Medical Services by Supplemental Security Income Recipients Living in the Community, Office of Policy and Economic Research, February 1983, Table 2, New York City Human Resources Administration (lodged as Appendix 4).

Having raised numerous complex legal issues at each stage, having forced plaintiffs to bring three contempt motions to enforce the terms of the Judgment and, indeed, having taken the issues all the way to this Court on a petition for certiorari, the State should not now be heard to contend that this case involved "relatively routine" issues that "could not have been considered complex by any attorney with welfare law experience," Brief for Petitioner, p. 31.

Measured against the standards set by Congress, it is apparent that the District Court's upward adjustment of the lodestar figure by 50 percent was fully warranted under the circumstances of this litigation.

Documentation

The State also claims, again for the first time, that the District Court abused its discretion by failing to exclude allegedly undocumented and duplicative hours. The only objection made in the District Court by the State on this aspect of the fee application was that the time spent by counsel on this litigation was "unreasonable." In fact, it was the State's contumacious conduct that greatly increased the time required by this litigation. The simplest and most reasonable way for the State to have limited its liability for attorney fees would have been to comply promptly with the Final Judgment. Instead, plaintiffs' attorneys were required to expend considerable effort to enforce the Judgment they had won. *See Copeland* v *Marshall*, 641 F.2d at 904; *Stanford Daily*, 64 F.R.D. at 683. Nonetheless, the State asserted that the allegedly excessive hours were due to duplication of effort of plaintiffs' three attorneys. Defendant's Fee Memorandum at 9-13. No claim was made that plaintiffs' timesheets were inaccurate.[89] Al-

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[89] The State now alleges that the time records referring to the hours claimed by Ms. Moynihan and Ms. Galowitz on the summary motion refute the Society's explanation of how the work was divided. Brief for Petitioner at 47-48 n.**. In making this claim, the State omits reference to Mr. Fried's work during that time. His affidavit reveals that he performed the editing functions on that motion (JA 310). Ms. Moynihan and Ms. Galowitz resear-

though all three attorneys were present in court on the day of the fee hearing, none was asked to testify concerning the manner in which the time records were kept, the precautions taken to prevent duplication or the efficiency with which they worked. No depositions were taken, and none of the attorneys were asked to produce original time records. Instead, the State forfeited its right to a hearing, disdained production of any evidence, and appealed to the knowledge and expertise of the District Judge in weighing its claim that the hours expended were duplicative and excessive. Plaintiffs' attorneys, on the other hand, submitted detailed affidavits concerning their work on this case and the efficient manner in which it was divided. *See* pp. 7, 12, *supra*.

The District Judge held that the complexity of the issues presented by this case "fully warranted the hours devoted to [the proceedings]." The court also expressly held that the work performed on this litigation "was divided in such a way as to avoid duplication."[90] JA 357-58. The State has presented no reason worthy of consideration by this Court for disturbing these findings.

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ched and drafted different parts of the summary judgment papers, while the more experienced attorney, Mr. Fried, reviewed the written material and assisted in strategic decisions.

[90] The fact that more than one attorney works on a matter does not give rise to a "presumption of duplication." The district court must be accorded ample discretion in assessing whether counsel avoided duplication of effort. *Willowbrook*, 711 F.2d at 1146.

CONCLUSION

For the above-stated reasons, the judgment below should be affirmed.

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Appendix

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No. 81-1374

In the

Supreme Court of the United States

October Term, 1982

BARBARA BLUM, individually and in her capacity as Commissioner of the New York State Department of Social Services,

Petitioner,

-against-

ELLEN STENSON, individually and on behalf of all other persons similarly situated,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' LODGING

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Appendix 1

Federal Statutes Authorizing the Award of Attorneys' Fees1/

Act to Prevent Pollution from Ships, 33 U.S.C. § 1910(d).

Age Discrimination Act of 1975 (as amended by Pub. L. No. 95-478, § 401(c)), 42 U.S.C. § 6104(e)(1).

Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626(b) (incorporating by reference 29 U.S.C. § 216(b)).

Agricultural Fair Practices Act of 1967, 7 U.S.C. § 2305(a), (c).

Aliens' Real Estate Ownership Act, 48 U.S.C. § 1506.

Atomic Energy Act of 1954, 42 U.S.C. § 2184.

Bank Holding Company Act Amendments of 1970, 12 U.S.C. § 1975.

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1. The collection of fee statutes appearing in this Appendix is based upon the compilation prepared by the Congressional Research Service, reprinted in Award of Attorneys' Fees Against the Federal Government: Hearings on S.265 Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 96th Cong., 2d Se.s. 611-629 (1980), and the list published in 6 Att'y Fee Awards Rep. 2-3 (Aug. 1983).

Bankruptcy Act of 1898, 11 U.S.C. §§ 109, 641, 642, 643, 644.2/

Bankruptcy Reform Act of 1978, 11 U.S.C. §§ 303(i), 330(a), 363(n), 503(b).

Black Lung Benefits Act of 1972, 30 U.S.C. §§ 932(a), 938(c).3/

Civil Rights Act of 1964, Title II, 42 U.S.C. § 2000a-3(b).

Civil Rights Act of 1964, Title III, 42 U.S.C. § 2000b-1.

Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-5(k).

Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988.

Civil Rights of Institutionalized Persons Act, 42 U.S.C. §§ 1997a(b), 1977c(d).

Civil Service Reform Act of 1978, 5 U.S.C. §§ 5596(b)(1), 7701(g).

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2. The Bankruptcy Act of 1898 has been repealed by the Bankruptcy Reform Act of 1978. Pub. L. No. 95-598, Title IV, § 401(a). It has been included here because cases filed prior to October 1, 1979, the effective date of the Reform Act, continue to be governed by the provisions of the older statute. Pub. L. No. 95-598, Title IV, § 403(a).

3. Section 932(a) has been construed to incorporate the attorneys' fee provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 928. See Director, Office of Workers' Compensation Programs v. Black Diamond Coal Mining Co., 598 F.2d 945 (5th Cir. 1979).

Clayton Act, 15 U.S.C. § 15.

Clean Air Act (as amended by Pub. L. No. 95-95), 42 U.S.C. §§ 7413(b), 7604(d), 7607(f), 7622(b)(2)(B), (e)(2).

Commodity Futures Trading Commission Act of 1974, 7 U.S.C. § 18(d), (e).

Communications Act of 1934, 47 U.S.C. §§ 206, 407.

Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9610, 9612(c).

Condominium and Cooperative Abuse Relief Act of 1980, 15 U.S.C. §§ 3608(d), 3611(d).

Consumer Leasing Act of 1976, 15 U.S.C. § 1667b(a).

Consumer Product Safety Act, 15 U.S.C. §§ 2060(c), (f), 2072(a), 2073.

Copyrights Act, 17 U.S.C. § 505.

Deep Seabed Hard Mineral Resources Act, 30 U.S.C. § 1427(c).

Deepwater Port Act of 1974, 33 U.S.C. § 1515(d).

Electronic Fund Transfer Act, 15 U.S.C. § 1693m(a), (f).

Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132(g).

Endangered Species Act of 1973, 16 U.S.C. § 1540(g)(4).

Energy Policy and Conservation Act, 42 U.S.C. § 6305(d).

Energy Reorganization Act of 1974 (as amended by Pub. L. No. 95-601), 42 U.S.C. § 5851(b)(2)(B), (e)(2).

Equal Access to Justice Act, 5 U.S.C. § 504, 28 U.S.C. § 2412.

Equal Credit Opportunity Act, 15 U.S.C. § 1691e(d).

Ethics in Government Act of 1978, 2 U.S.C. § 288i(d).

Fair Credit Reporting Act, 15 U.S.C. § 1681n, o.

Fair Debt Collection Practices Act, 15 U.S.C. § 1692k(a).

Fair Housing Act of 1968, 42 U.S.C. § 3612(c).

Fair Labor Standards Act, 29 U.S.C. § 216(b).

Federal Contested Election Act, 2 U.S.C. § 396.

Federal Credit Union Act, 12 U.S.C. § 1786(p).

Federal Deposit Insurance Act, 12 U.S.C. § 1818(n).

Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. § 815(c)(3).

Federal Power Act, 16 U.S.C. § 825q-1(b)(2).

Federal Trade Commission Improvement Act, 15 U.S.C. § 57a(h)(1).

Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1365(d).

Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1810(c).

Foreign Relations Authorization Act, 22 U.S.C § 2692(a).

Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E).

Government in the Sunshine Act, 5 U.S.C. § 552b(h)(2)(i).

Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. §§ 15c(a)(2), (d)(2), 26.

Hobby Protection Act, 15 U.S.C. § 2102.

Home Owners' Loan Act of 1933, 12 U.S.C. § 1464(d)(8)(A).

Interstate Commerce Act, 49 U.S.C. §§ 11705(d)(3), 11708(c), 11710(b), 11711(d), (e).

Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1709.

Jewelers' Liability Act, 15 U.S.C. § 298(b), (c), (d).

Judicial Code, 28 U.S.C. §§ 1912, 1927.

Jury System Improvements Act of 1978, 28 U.S.C. § 1875(d)(2).

Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 431(c), 501(b).

Legal Services Corporation Act, 42 U.S.C. § 2996e(f).

Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 928, 933(e).

Magnuson-Moss Warranty Act, 15 U.S.C. § 2310(d)(2).

Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. § 1415(g)(4).

Merchant Marine Act, 46 U.S.C. § 1227.

Motor Vehicle Information and Cost Savings Act, 15 U.S.C. §§ 1918(a), 1989(a).

National Historic Preservation Act, 16 U.S.C. § 470w-4.

National Housing Act, 12 U.S.C. § 1730(m)(3).

National Mobile Home Construction and Safety Standards Act of 1974, 42 U.S.C. § 5412(b).

National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1400(b).

Natural Gas Pipeline Safety Act, 49 U.S.C. § 1686(e).

Noise Control Act of 1972, 42 U.S.C. § 4911(d).

Norris-LaGuardia Act, 29 U.S.C. § 107(e).

Ocean Thermal Energy Conversion Act of 1980, 42 U.S.C. § 9124(d).

Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2520.

Omnibus Crime Control and Safe Streets Act of 1968 (as amended by Pub. L. No. 96-157), 42 U.S.C. § 3789d(c)(4)(B).

Organized Crime Control Act of 1970, 18 U.S.C. § 1964(c).

Outer Continental Shelf Lands Act Amendments of 1978, 43 U.S.C. § 1349(a)(5), (b)(2).

Packers and Stockyards Act, 7 U.S.C. § 210(f).

Patent Code, 35 U.S.C. § 285.

Perishable Agricultural Commodities Act, 7 U.S.C. § 499g(b), (c).

Petroleum Marketing Practices Act, 15 U.S.C. § 2805(d)(1), (3).

Plant Variety Protection Act, 7 U.S.C. § 2565.

Powerplant and Industrial Fuel Use Act of 1978, 42 U.S.C. § 8435(d).

Privacy Act of 1974, 5 U.S.C. § 552a(g)(2)(B), (3)(B), (4)(B).

Privacy Protection Act of 1980, 42 U.S.C § 2000aa-6.

Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 2632(a).

Railroad Revitalization and Regulatory Reform Act of 1976, 45 U.S.C. § 854(g).

Railway Labor Act, 45 U.S.C. § 153(p).

Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2607(d)(2).

Rehabilitation Act of 1973 (as amended by Pub. L. No. 95-602, § 120), 29 U.S.C. § 794a(b).

Right to Financial Privacy Act of 1978, 12 U.S.C. §§ 3417(a), 3418.

Safe Drinking Water Act, 42 U.S.C. §§ 300j-8(d), 9(i)(2)(B)(ii).

Securities Act of 1933, 15 U.S.C. § 77k(e).

Securities Exchange Act of 1934, 15 U.S.C. §§ 78i(e), 78r(a), 78u(h).

Securities Investor Protection Act of 1970 (as amended by Pub. L. No. 95-283, § 7), 15 U.S.C. § 78eee(b)(5).

Solid Waste Disposal Act, 42 U.S.C. §§ 6971(c), 6972(e).

State and Local Fiscal Assistance Amendments of 1976, 31 U.S.C. § 6721(c)(2).

Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1270(d), (f), 1275(e), 1293(c).

Tax Equity and Fiscal Responsibility Act of 1982, 26 U.S.C. § 7430.

Tax Reform Act of 1976, 26 U.S.C. § 6110(i)(2).

Toxic Substances Control Act, 15 U.S.C. §§ 2605(c)(4)(A), 2618(d), 2619(c)(2), 2620(b)(4)(C), 2622(b)(2)(B).

Trademark Act of 1946, 15 U.S.C. § 1117.

Trust Indenture Act of 1939, 15 U.S.C. § 77ooo(e), www(a).

Truth In Lending Act, 15 U.S.C. § 1640(a)(3).

Unfair Competition Act, 15 U.S.C. § 72.

Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. § 4654.

Voting Rights Act of 1965 (as amended by Pub. L. No. 94-73, § 402), 42 U.S.C. § 1973/(e).

Federal Court Rules Authorizing the Award of Attorneys' Fees

Federal Rules of Appellate Procedure, Rule 38.

Federal Rules of Civil Procedure, Rules 11, 16(f), 37, 56(g).

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NOs. 80-1761 and 80-2275

STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

SANGAMO CONSTRUCTION COMPANY
and J.L. SIMMONS COMPANY, INC.,

Defendants-Appellants.

Appeal from the United States District Court
for the Central District of Illinois
Danville Division
The Honorable Harold A. Baker, Judge Presiding

BRIEF FOR THE STATES OF ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, HAWAII, INDIANA, IOWA, KANSAS, LOUISIANA, MAINE, MARYLAND, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, OREGON, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA AND WISCONSIN AND THE COMMONWEALTHS OF KENTUCKY, MASSACHUSETTS AND PENNSYLVANIA, AS AMICI CURIAE IN SUPPORT OF THE APPELLEE

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NOs. 80-1761 and 80-2275

STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

SANGAMO CONSTRUCTION COMPANY
and J.L. SIMMONS COMPANY, INC.,

Defendants-Appellants.

Appeal from the United States District Court
for the Central District of Illinois
Danville Division
The Honorable Harold A. Baker, Judge Presiding

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I. INTEREST OF AMICI CURIAE

The States of Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia and Wisconsin and the Commonwealths of Kentucky, Massachusetts and Pennsylvania respectfully submit this brief amici curiae in opposition to the appeal of Sangamo Construction Co. and J.L. Simmons Company, Inc. from the decision of the United States District Court for the Central Division of Illinois, Danville Division, in accordance with Rule 29 of the Federal Rules of Appellate Procedure.

Nearly all of the sovereign states of the Union are respresented in this brief as amici. The Attorneys General of these states are charged with responsibility for enforcement of respective state antitrust laws and representation of state and/or local governmental entities in civil actions commenced in federal court for damages resulting from violations of the Sherman Act (15 U.S.C. §1, et seq.).*/

Only recently, the United States Congress enhanced the states' role in the antitrust enforcement area by authorizing substantial appropriations for the purpose of developing or

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*/ The Commonwealth of Pennsylvania has not yet created a state antitrust law and brings actions under the provisions of the federal antitrust laws.

expanding the state Attorneys General enforcement capability. 42 U.S.C. §3701. The significance of the state Attorneys General in assuring nationwide antitrust compliance was recognized further by federal legislation which authorized the states to sue as parens patriae to recover damages for citizens injured by violations of the Sherman Act. 15 U.S.C. §15(c).

Each of the amici states, through its chief law enforcement officer, is now participating in one or more proprietary or parens patriae actions commenced in Federal District Court under Section 4 of the Clayton Act (15 U.S.C. §15). It is anticipated that this participation will continue with respect to future violations of the Sherman Act, supra, which result in damage to the states, their political subdivisions or their citizens in their proprietary capacities. Indeed, each of the amici states is extremely interested in enhancing its in-house antitrust enforcement capabilities. A decision by this Court limiting the extent to which an Attorney General could be awarded attorneys' fees would clearly have an adverse impact on any such future development.

Accordingly, the amici states have direct and substantial interest in the right of Attorneys General to attorneys' fees under Section 4 of the Clayton Act and any decision of this Court pertaining thereto.

II. ARGUMENT

A. An Award of Attorneys' Fees to a State Attorney General Under Section 4 of the Clayton Act is Proper

In holding that Section 4 of the Clayton Act permits a state to sue in its proprietary capacity for three times the damages sustained as a result of an antitrust violation, the United States Supreme Court stated, in Hawaii v. Standard Oil of California, 405 U.S. 251 at 262 (1972):

> Every violation of the antitrust laws is a blow to the free-enterprise system envisaged by Congress. See Northern Pacific R. Co. v. United States, 356 U.S. 1, 4 (1958). This system depends on strong competition for its health and vigor, and strong competition depends, in turn, on compliance with antitrust legislation. In enacting these laws, Congress had many means at its disposal to penalize violators. It could have, for example, required violators to compensate federal, state, and local governments for the estimated damage to their respective economies caused by the violations. But, this remedy was not selected. Instead, Congress chose to permit all persons to sue to recover three times their actual damages every time they were injured in their business or property by an antitrust violation. By offering potential litigants the prospect of a recovery in three times the amount of their damages, Congress encouraged these persons to serve as "private attorneys general."

In view of this language of the Supreme Court, it is incongruous to believe that a state Attorney General can be treated differently than private counsel with respect to the awarding of attorneys' fees under Section 4.

The duty of an Attorney General to sue on behalf of his

or her state and its political subdivisions to recover for injury resulting to them as a result of an antitrust violation is irrelevant to the right of a state for an award of attorneys' fees for its Attorney General's legal services. When a state brings suit for the recovery of treble damages under federal antitrust law, it is like any other private litigant seeking redress for proprietary injury. A state and its Attorney General who have successfully prosecuted a federal civil antitrust action and recovered damages or obtained injunctive relief must be compared to any other "private attorney general" who seeks compensation after receiving judgment in its favor.

Thus, District Courts throughout the country have awarded attorneys' fees to Attorneys General in antitrust cases. Liebman v. Peterson Coal & Oil Co., 63 F.R.D. 684 (N.D. Ill. 1974); In re Gypsum Antitrust Cases, 386 F.Supp. 959 (N.D. Cal., 1974); In re Coordinated Pretrial Proceedings in Antibiotics Antitrust Actions, 410 F.Supp. 706, 717 (D. Minn., 1975); In re Master Key Antitrust Litigation, 1978-1 Trade Cases ¶61,887 (D. Conn. 1978); In re Sugar Antitrust Litigation (Western), M.D.L. 201, (N.D. Cal., November 28, 1979) (a copy of which is included in Appellee's Appendix at A-58); In re Armored Cars Antitrust Litigation, 1979-1 Trade Reg. Rep. ¶62,662 (N.D. Ga. 1979); In re Chicken Antitrust Litigation, 1980-2 Trade Reg. Rep. ¶63,485 (N.D. Ga. 1980).

B. Attorneys' Fees Awarded to State Attorneys General Should Be Based on Market Value, Reflecting the General Quality of their Work, Reputation, Expertise and Status Within the Antitrust Bar

While Attorneys General do not have hourly rates in the same sense as private counsel, attorneys' fees awarded them under Section 4 of the Clayton Act should be based on the prevailing market rates charged by private attorneys with similar experience for similar work. See Ranger Insurance v. Algie, 482 F.2d 861, at 864 (5th Cir. 1973).

Whether attorneys' fees are being sought for a public attorney or private attorney, costs should not be a determinative factor; courts have not, and should not, become involved in cost analysis of a law office. Thus, in reversing a fee award of $30 per hour in a civil rights action brought by a Community Legal Services group, the Third Circuit in Rodriguez v. Taylor, 569 F.2d 1231 (3rd Cir. 1977), cert. denied, 436 U.S. 913 (1978), held that it was inappropriate to simply look at costs of attorneys services in assessing a reasonable attorneys' fee. 569 F.2d at 1248.

In In re Sugar Antitrust Litigation (Western), supra, the District Court for the Northern District of California specifically held that identical criteria should be used to establish hourly rates for private and government attorneys. It awarded fees to Attorneys General ranging from $45 to $75. Opinion re: Attorneys Fees and Costs, November 28, 1979, p.47,

fn.13. In In re Armored Car Antitrust Litigation, supra, the District Court for the Northern District of Georgia treated government attorneys in the same fashion as private counsel in determining the fees to be awarded under the equitable fund doctrine. In that case, the same hourly rate was applied to all non-lead counsel, including State Attorneys General. Similarly, in Liebman v. Peterson Coal & Oil Co., supra, the District Court for the Northern District of Illinois awarded fees to Attorneys General based on the "reasonable" value of their services, namely, an hourly rate of $60.

Most recently, market values were used in awarding fees for services performed by state Attorneys General in In re Chicken Antitrust Litigation, supra. In that action, the District Court awarded governmental attorneys hourly rates of from $50 per hour to $90 per hour. The Court specifically stated that the hourly rates "reflect the general quality of the public attorneys, their reputations, expertise and status within the antitrust bar." 1980-2 Trade Reg. Rep. ¶63,485 at p.76,558.

Other than the obvious fact that most state Attorneys General are funded differently than private law firms, all relevant considerations support the conclusion reached by the District Court below in the case sub judice, as well as the District Courts in the antitrust proceedings referred to above. The substance and quality of work provided by government attorneys is comparable to that performed by private

counsel. Assuming the success of litigation, the services provided by government attorneys confer the same appreciable benefits upon their clients as services provided by private attorneys. In choosing to pursue one antitrust action over another antitrust action, or any other type of action for that matter, the government attorney, like the private attorney, takes a significant risk with respect to success and ultimate recovery and experiences lost income potential resulting from allocation of limited attorney resources to the action pursued as opposed to another.

Finally, it must be recognized that the duty of a state Attorney General to represent the interests of his or her state, its political subdivisions or its citizens in an antitrust action is meaningless absent adequate legislative appropriation. The amici states, which have had the benefit of actual experience in securing legislative appropriations, can assert with certainty that appropriations for future antitrust enforcement efforts will be based significantly on past effectiveness and past effectiveness is measured in large degree by monetary recoveries, including damages and attorneys fees.

III. Conclusion

For the foregoing reasons, the amici states respectfully submit that the decision of the District Court awarding attorneys' fees based on prevailing market hourly rates to

the State of Illinois should be affirmed.

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APPENDIX 3 -- SURVEY OF SECTION 1988 FEE AWARDS*

Case	Attorneys	Total Hours Requested	Total Hours Compensated	Range of Hourly Rates Requested($)	Range of Hourly Rates Compensated($)	Lodestar Requested($)	Lodestar Granted($)	Adjustment(%)	Dates of Litigation Beg./End	Average Rate($)
Robert M. v. Benton, 671 F.2d 1104 (8th Cir. 1982)	NP	218.5	168.5	40	30	8,740.00	5,052.00	0	1978/1980	29.98
Hepperle v. Panama Machinery and Supply Co., 532 F. Supp. 1085 (N.D. Fla. 1982)	Pvt. and NP	138.5	138.5	-	10-75	-	5,701.44	0	1980/1982	41.17
Swope v. Bratton, 541 F. Supp. 99 (W.D. Ark. 1982)	Pvt.	408.45	372.3	60	35-60	24,507.00	16,201.00	0	1978/1982	43.52
Robinson v. Moreland, 655 F.2d 887 (8th Cir. 1981)	Pvt.	101.05	50	75	40-60	7,578.75	2,200.00	0	1979/1980	44.00

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* Respondent examined all cases appearing in the headnotes to § 1988 in the pocket part and supplement of the United States Code Annotated. 42 U.S.C.A. § 1988 (Supps. 1983 & June 1983). Respondent thus reviewed approximately 325 officially reported cases decided roughly from 1981 to the present. A case was entered on this chart if it contained data sufficient to ascertain one or more of the following: (i) the average hourly rate awarded; (ii) the range of hourly rates awarded (rounded to the nearest dollar); (iii) the number of hours requested by the fee applicant, and the hours compensated by the court; and (iv) the total award requested by the fee applicant, and the award granted by the court. All figures on the chart are with respect to attorneys only, and do not include compensation for paralegals or for expenses. Most of the cases which were not entered on this chart either limited discussion to various legal issues under § 1988, stated a total award without indication of the manner in which it was computed, noted that reasonable attorneys' fees would be awarded upon further proceedings, or granted fee awards which were not sustained on appeal.

Footnote continued on following page

Case	Attorneys	Total Hours Requested	Total Hours Compensated	Range of Hourly Rates Requested($)	Range of Hourly Rates Compensated($)	Lodestar Requested($)	Lodestar Granted($)	Adjustment(%)	Dates of Litigation Beg./End	Average Rate($)
Herrera v. Valentine, 653 F.2d 1220 (8th Cir. 1981)	Pvt.	-E	1,967	-	-	-	88,214.95	0	1976/1979	44.85
Huebschen v. Dept. of Health and Social Services, 547 F. Supp. 1168 (W.D. Wis. 1982)	Pvt.	-	517.3	50-75	30-50	44,028.44	23,771.00	0	1981/1982	45.95
Jones v. Federated Dept. Stores, Inc., 527 F. Supp. 912 (S.D. Ohio 1981)	-	-	154.9	60-75	25-65	-	7,248.50	10	1979/1981	46.79
Vaughn v. Westinghouse Electric Corp., 526 F. Supp. 1165 (E.D. Ark. 1981), aff'd,702 F.2d 137 (8th Cir. 1983)	Pvt. and -	428.96	331.15	75-125	40-85	42,696.00	15,730.00	0	1974/1981	47.50
Life Science Church v. Vocke, 531 F. Supp. 790 (E.D. Wis. 1982)	NP and -	-	20	-	50	1,650.00	1,000.00	0	1981/1981	50.00
Cantrell v. Vickers, 524 F. Supp. 312 (N.D. Miss. 1981)	Pvt.	310.5	222	50-100	40-75	18,865.00	11,578.75	0	1979/1980	52.16
Laje v. R.E. Thomason General Hospital, 502 F. Supp. 185 (W.D. Tex. 1980)	Pvt.	553.7	409.9	60-100	25-100	43,977.50	21,754.00	0	1973/1980	53.07

Footnote continued from previous page:

For each case, the chart indicates, left to right: (i) whether the attorneys were private (Pvt.) or nonprofit (NP); (ii) the total hours requested by the fee applicant; (iii) the total hours compensated by the court; (iv) the range of hourly rates requested; (v) the range of hourly rates compensated by the court; (vi) the lodestar amount requested; (vii) the lodestar amount granted; (viii) the percent adjustment to the lodestar; (ix) the time period over which the litigation took place; and (x) the average hourly rate awarded in the case, computed by dividing the lodestar figure by the total number of hours compensated. The cases have been ranked in ascending order on the basis of this last figure. Cases for which an average hourly rate could not be ascertained were placed at the end of the chart. A dash on the chart indicates that the reported opinion did not reveal the pertinent data.

E Requested figure was reduced by the court by an unspecified amount.

Case	Attorneys	Total Hours Requested	Total Hours Compensated	Range of Hourly Rates Requested($)	Range of Hourly Rates Compensated($)	Lodestar Requested($)	Lodestar Granted($)	Adjustment(%)	Dates of Litigation Beg./End	Average Rate($)
Skomorucha v. Wilmington Housing Auth., 518 F. Supp. 657 (D. Del. 1981)	Pvt.	209.6	199.6	50-75	50-75	12,792.50	10,625.00	0	1980/1981	53.23
Wuori v. Concannon, 551 F. Supp. 185 (D. Me. 1982)	NP	1,382.5	1,306.75	40-75	40-75	88,935.00	70,936.25	(10.03)[B]	1975/1982	54.28
Hinkle v. Christensen, 548 F. Supp. 630 (D.S.D. 1982)	Pvt.	258.25	178	55	55	14,203.75	9,790.00	0	1981/1982	55.00
Dowdell v. City of Apopka, 521 F. Supp. 297 (M.D. Fla. 1981), modified on other grounds, 698 F.2d 1181 (11th Cir. 1983)	-	1,446.75	1,446.75	100-125	40-80	146,475.00	83,559.00	14.16[D]	1978/1981	57.76
Allen v. Burke, 690 F.2d 376 (4th Cir. 1982)	Pvt.	121.8	121.8	60	60	7,308.00	7,308.00	0	1980/1982	60.00
Johnston v. Jago, 691 F.2d 283 (6th Cir. 1982)	Pvt.	-	16	-	60	-	960.00	0	1977/1980	60.00
Hernas v. City of Hickory Hills, 517 F. Supp. 592 (N.D. Ill. 1981)	Pvt.	-[E]	6.4	60	60	-	384.00	0	1980/1980	60.00
Kennelly v. Lemoi, 529 F. Supp. 140 (D.R.I. 1981)	Pvt.	205.25	204.8	70-75	60-65	14,532.50	12,453.00	10	1976/1980	60.81
Glover v. Johnson, 531 F. Supp. 1036 (E.D. Mich. 1982)	NP and Pvt.	-	1,436.85	-	33-110	108,315.00	87,809.53	0	1977/1981	61.11

B Adjustment awarded with respect to less than the total lodestar granted.

D Average of varying percentage adjustments awarded to different attorneys.

E Requested figure was reduced by the court by an unspecified amount.

Case	Attorneys	Total Hours Requested	Total Hours Compensated	Range of Hourly Rates Requested($)	Range of Hourly Rates Compensated($)	Lodestar Requested($)	Lodestar Granted($)	Adjustment(%)	Dates of Litigation Beg./End	Average Rate($)
Conner v. Winter, 519 F. Supp. 1337 (S.D. Miss. 1981)	NP	1,265.25	1,265.25	- -100	50-75	-	77,618.75	0	1973/1979	61.35
Gibbons v. Bond, 523 F. Supp. 843 (W.D. Mo. 1981), aff'd, 668 F.2d 967 (8th Cir. 1982)	Pvt.	84.6	84.6	80	60-80	6,768.00	5,216.00	0	1981/1981	61.65
Mattie T. v. Holladay, 522 F. Supp. 72 (N.D. Miss. 1981)	NP	1,541.5	1,310	30-100	30-75	126,618.25	82,350.00	0	1975/1980	62.86
Palmigiano v. Garrahy, 466 F. Supp. 732 (D.R.I. 1979), aff'd, 616 F.2d 598 (1st Cir.), cert. denied, 449 U.S. 839 (1980)	NP	1,365.5	1,323.75	-	30-80	-	86,655.00	0	1974/1979	65.46
Battle v. Anderson, 541 F. Supp. 1061 (E.D. Okla. 1982)	NP	3,601.45	3,601.45	-	50-80	280,700.00	237,017.75	0	1972/1982	65.81
Brewster v. Dukakis, 544 F. Supp. 1069 (D. Mass. 1982)	Pvt. and NP	6,260.25	4,994.92	50-120	50-80	600,000.00	337,420.70	10	1976/1981	67.55
Espinoza v. Hillwood Square Mutual Ass'n., 532 F. Supp. 440 (E.D. Va. 1982)	Pvt. and -	503.25	266.438	65-85	65-85	34,488.75	18,104.72	10	1981/1981	67.95
McBroom v. Western Elec. Co., Inc., 526 F. Supp. 831 (M.D.N.C. 1981)	Pvt.	1,176.5	1,176.5	65-85	60-75	91,505.00	81,078.75	0	1973/1981	68.92

Case	Attorneys	Total Hours Requested	Total Hours Compensated	Range of Hourly Rates Requested($)	Range of Hourly Rates Compensated($)	Lodestar Requested($)	Lodestar Granted($)	Adjustment(%)	Dates of Litigation Beg./End	Average Rate($)
Ross v. Saltmarsh, 521 F. Supp. 753 (S.D.N.Y. 1981), aff'd, 688 F.2d 816 (2d Cir. 1982)	NP	3,312.2	3,135.26	-	40-90	-	222,163.40	25	1974/1981	70.86
Doulin v. White, 549 F. Supp. 152 (E.D. Ark. 1982)	Pvt.	1,177.6	471.2	50-85	-	82,809.00	33,560.00	0	1981/1982	71.22
Heritage Homes of Attleboro, Inc. v. Seekonk Water Dist., 548 F. Supp. 167 (D. Mass. 1982)	Pvt.	598.5	589	80	60-80	47,880.00	41,960.00	26.5	1977/1981	71.24
Walker v. Wegner, 535 F. Supp. 415 (D.S.D. 1982)	Pvt.	181.66	137.49	50-125	50-100	16,792.98	9,878.50	0	1979/1981	71.85
Dickerson v. Pritchard, 551 F. Supp. 306 (W.D. Ark. 1982), aff'd, 706 F.2d 256 (8th Cir. 1983)	Pvt.	104.5	104.5	60-80	60-80	7,536.00	7,536.00	50	1981/1982	72.11
Allen v. Terminal Transport Co., Inc., 486 F. Supp. 1195 (N.D. Ga. 1980), aff'd, 638 F.2d 1232 (5th Cir. 1981)	NP	637	637	60-90	60-90	46,942.50	46,942.50	0	1972/1979	73.69
E.E.O.C. v. Sage Realty Corp., 521 F. Supp. 263 (S.D.N.Y. 1981)	NP	1,000.25	868.5	- -125	30-110	94,697.50	64,372.50	35[B]	1978/1981	74.12
Kow v. N.Y.C. Housing Auth., 539 F. Supp. 708 (S.D.N.Y 1982)	NP	107	75	-	75	11,021.35	5,625.00	0	1981/1982	75.00

B Adjustment awarded with respect to less than the total lodestar granted.

Case	Attorneys	Total Hours Requested	Total Hours Compensated	Range of Hourly Rates Requested($)	Range of Hourly Rates Compensated($)	Lodestar Requested($)	Lodestar Granted($)	Adjustment(%)	Dates of Litigation Beg./End	Average Rate($)
Larson v. Wind, 548 F. Supp. 479 (N.D. Ill. 1982)	Pvt.	17.25	17.25	75	75	1,293.75	1,293.75	0	1981/1982	75.00
Whiten v. Ryder Truck Lines, Inc., 520 F. Supp. 1174 (M.D. La. 1981)	Pvt.	-	100	-	75	-[E]	7,500.00	0	1977/1980	75.00
Strama v. Peterson, 689 F.2d 661 (7th Cir. 1982)	Pvt.	384.25	384.25	50-80	50-80	28,822.50	28,822.50	0	1978/1981	75.01
Goddard v. Babbitt, 547 F. Supp. 373 (D. Ariz. 1982)	Pvt.	2,682.6	2,431.8	50-250	60-90	299,695.50	190,182.00	0	1981/1982	78.21
Nicholson v. Bates, 544 F. Supp. 256 (E.D. Tex. 1982)	NP	116.5	116.5	-	50-100	-	9,150.00	0	1979/1981	78.54
Matter of Gibbs, 12 B.R. 737 (D. Conn. 1981)	NP	59.5	59.5	100-125	80	6,537.50	4,760.00	0	1980/1981	80.00
Avalon Cinema Corp. v. Thompson, 689 F.2d 137 (8th Cir. 1982)	Pvt.	210.05	207.15	70-190	70-110	28,386.00	16,661.97	0	1981/1982	80.43
Alexander v. City of Minneapolis, 545 F. Supp. 586 (D. Minn. 1982)	Pvt.	263.6	253.3	80-150	60-100	25,009.00	20,805.00	11[B]	1981/1982	82.14
Stewart v. Rhodes, 656 F.2d 1216 (6th Cir. 1981), cert. denied, 455 U.S. 991 (1982)	NP	-[E]	875.75	-	15-90	-	72,068.00[C]	0	1977/1979	82.29
Vickerman v. Hennepin County Probate Court, 543 F. Supp. 165 (D. Minn. 1982)	Pvt.	2,316.83	1,801.83	70-100	55-100	201,654.60	152,421.22	25[B]	1978/1980	84.59

B Adjustment awarded with respect to less than the total lodestar granted.

C Excludes award to co-counsel for which only lodestar granted, and no other figure, was indicated.

E Requested figure was reduced by the court by an unspecified amount.

Case	Attorneys	Total Hours Requested	Total Hours Compensated	Range of Hourly Rates Requested($)	Range of Hourly Rates Compensated($)	Lodestar Requested($)	Lodestar Granted($)	Adjustment(%)	Dates of Litigation Beg./End	Average Rate($)
Suzuki v. Yuen, 678 F.2d 761 (9th Cir. 1982)	Pvt.	-	111.9	55-100	55-100	17,071.00	9,604.00	0	- /1981	85.83
Waters v. City of Chicago, 443 N.E. 2d 759 (Ill. App. 1982)	Pvt.	-	1,288	-	75-100	114,326.66	110,900.00	0	1979/1981	86.10
Ramos v. Lamm, 539 F. Supp 730 (D. Colo. 1982)	Pvt. and NP	8,287.95	7,866.75	45-200	60-125	-	680,152.00	0	1977/1982	86.46
Stenson v. Blum, 512 F. Supp. 680 (S.D.N.Y. 1981), aff'd, 671 F.2d 493 (2nd Cir. 1981), cert. granted, 51 U.S.L.W. 3857 (U.S. May 31, 1983) (81-1374)	NP	809.75	809.75	95-105	95-105	79,312.00	79,312.00	50	1978/1980	97.95
Vulcan Soc. of Westchester County v. Fire Dept. of City of White Plains, 533 F. Supp. 1054 (S.D.N.Y. 1982)	Pvt.	3,288.25	3,258	80-125	80-110	385,550.00	341,872.50	50[B]	1978/1982	104.93
Carter v. Shop Rite Foods, 503 F. Supp. 680 (N.D. Tex. 1980)	Pvt.	1,407.95	1,407.95	-	90-120	172,500.00	147,928.00	0	1974/1979	105.07
Rajender v. University of Minnesota, 546 F. Supp. 158 (D. Minn. 1982)	Pvt.	6,997.25	6,988.25	80-125	80-125	764,518.75	763,697.50	200[B]	1973/1982	109.28
Tasby v. Wright, 550 F. Supp. 262 (N.D. Tex. 1982)	Pvt. and NP	4,547.45	2,664.86	75-185	60-175	569,960.75	309,678.00	25.2[F]	1976/1982	116.21

B Adjustment awarded with respect to less than the total lodestar granted.

F Average of varying percentage adjustments awarded for different periods of the litigation.

Case	Attorneys	Total Hours Requested	Total Hours Compensated	Range of Hourly Rates Requested($)	Range of Hourly Rates Compensated($)	Lodestar Requested($)	Lodestar Granted($)	Adjustment(%)	Dates of Litigation Beg./End	Average Rate($)
Gautreaux v. Chicago Housing Auth., 690 F.2d 601 (7th Cir. 1982), cert. denied, 103 S.Ct. 2438 (1983)	NP	3,003	3,003	125-175	125	-	375,375.00	0	1965/1980	125.00
Green v. Williams, 541 F. Supp. 863 (E.D. Tenn. 1981), modified, 705 F.2d 846 (6th Cir. 1983)	NP	184.9	184.9	125-200	163-200	-	30,533.75	16.38	1978/1981	165.14
Coen v. Harrison County School Board, 638 F.2d 24 (5th Cir. 1981), cert. denied, 455 U.S. 938 (1982)	NP	-	-	-	-	8,192.36	100.00	0	- /1978	-
Crosby v. Bowling, 683 F.2d 1068 (7th Cir. 1982)	NP	-	-	-	-	30,527.80	18,439.50	0	- /1980	-
Fernandes v. Limmer, 663 F.2d 619 (5th Cir. 1981), cert. dismissed, 103 S.Ct. 5 (1982)	Pvt.	-	-	-	-	35,000.00	17,500.00	0	1974/1979	-
Sotomura v. County of Hawaii, 679 F.2d 152 (9th Cir. 1982)	Pvt.	-	-	-	-	34,941.40	25,000.00	0	- /1982	-
Tonti v. Petropoulous, 656 F.2d 212 (6th Cir. 1981)	Pvt.	-	-	-	-	98,510.00	98,510.00	0	- /1979	-
Wheatley v. Ford, 679 F.2d 1037 (2d Cir. 1982)	-	-	-	-	-	29,742.00	29,742.00	0	- /1982	-
White v. New Hampshire Dept. of Employment Security, 679 F.2d 283 (1st Cir. 1982)	-	-	-	-	35-50	-	16,000.00	0	1976/1979	-

Case	Attorneys	Total Hours Requested	Total Hours Compensated	Range of Hourly Rates Requested($)	Range of Hourly Rates Compensated($)	Lodestar Requested($)	Lodestar Granted($)	Adjustment(%)	Dates of Litigation Beg./End	Average Rate($)
Whitley v. Seibel, 676 F.2d 245 (7th Cir. 1982), cert. denied, 103 S.Ct. 254 (1982)	-	277	-	110	-	30,470.00	10,000.00	0	- /1981	-
Forrest v. N.Y.C. Crim. Justice Agency, 549 F. Supp. 211 (S.D.N.Y. 1982)	Pvt.	-	-	-	-	12,637.50	12,637.50	0	1979/1982	-
Gary B. v. Cronin, 542 F. Supp. 102 (N.D. Ill. 1980)	NP and Pvt.	-	-	-	-	110,565.75	65,000.00	0	1979/1980	-
Harceg v. Brown, 536 F. Supp. 125 (N.D. Ill. 1982)	Pvt.	-	-	-	-	241,887.40	228,225.40	0	1980/1982	-
Kaimowitz v. Howard, 547 F. Supp. 1345 (E.D. Mich. 1981)	Pvt.	-	-	-	-	59,548.63	8,583.75	(46.6)	1980/1981	-
Robinson v. Goff, 517 F. Supp. 350 (W.D. Va. 1981)	-	22.7	-	80	-	1,816.00	1,500.00	0	1980/1981	-
Skoda v. Fontani, 519 F. Supp. 309 (N.D. Ill. 1981)	Pvt.	-	-	-	-	10,441.25	6,086.12	0	1979/1980	-
Spence v. Eastern Airlines, Inc., 547 F. Supp. 204 (S.D.N.Y. 1982)	Pvt.	-	-	-	-	26,000.00	1,500.00	0	1980/1982	-
Tyler v. Board of Ed. of Newcastle County Vocational-Technical School Dist., 519 F. Supp. 834 (D. Del. 1981)	Pvt.	-	-	50-90	50-90	-	31,865.00	25[B]	1980/1981	-
Wiggins v. Roberts, 551 F. Supp. 57 (N.D. Ala. 1982)	Pvt.	-	-	-	-	7,239.63	4,855.13	0	1975/1981	-

B Adjustment awarded with respect to less than the total lodestar granted.

Appendix 4

AR-18

USE OF MEDICAL SERVICES BY SUPPLEMENTAL SECURITY INCOME RECIPIENTS LIVING IN THE COMMUNITY

By

Miles Storfer, Director

and

Dr. Janet Wedel and Guy Florio

Office of Policy and
Economic Research

February 1983

THE CITY OF NEW YORK
HUMAN RESOURCES ADMINISTRATION
James A. Krauskopf,
Administrator/Commissioner

OFFICE OF POLICY
AND PROGRAM DEVELOPMENT
Donna Kirchheimer
Acting Deputy Administrator

I. INTRODUCTION

In July 1980 there were a total of approximately 231,000 Supplemental Security Income (SSI) recipients in New York City. Of these, approximately 213,000 or 92.2 percent resided in the community. The rest lived in some type of congregate care facility such as family care homes or residental care homes, or chronic care medical facility such as nursing homes, either skilled nursing or health-related facilities.

SSI is a federally supported and administered program of income support for individuals and couples who are 65 or over or are disabled or blind, regardless of age, and who meet financial eligibility criteria.

Of the SSI recipients living in the community 103,000 are aged persons (48.4 percent) and 110,000 are disabled persons (51.6 percent).[1] Medical services are financed for this population through two programs: Medicaid and Medicare.[2]

Medicaid is essentially a program of last resort, covering medical costs after other sources of private or public insurance have been exhausted. Medicare is available to persons over 65 and those under 65 who have been permanently and totally disabled for at least 24 months and received Social Security either as a worker or a dependent of a worker. Medicaid often supplements Medicare to pay for services either not covered or not fully paid by Medicare for this population.

Medicare is fully financed by the federal government. The cost of Medicaid for SSI recipients is borne 50 percent by the federal government and 25 percent each by the State and the City.

The purpose of this report is to assess the use of medical services by a sample of SSI recipients living in the community. The report examines medical

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[1] Blind and disabled people over age 65 are included in the aged total, and blind and disabled people under age 65 are included in the disabled total. Overall, 2,507 people are classified as blind.

[2] This report does not contain information on payments by other health insurance providers (e.g., Blue Cross).

utilization by the two categories of SSI recipients living in the community--the aged and the disabled--and the costs to the Medicaid and Medicare programs of various medical services in behalf of these recipients.[3] Home care utilization and costs (another medical service provided to this population) is examined separately in Appendix C of this report. The home care analysis however, is not based on the sample data but rather on aggregate data for all aged and disabled Medicaid recipients.

Based on sample results a total of approximately $410 million was spent in 1980 in behalf of SSI recipients living in the community.

Of the total medical expenditures for SSI recipients living in the community, Medicaid paid $250 million (61 percent) and Medicare paid $160 million (39 percent).

Table 1 shows that of the combined medical expenditures for the aged and disabled living in the community, medical services provided to the disabled totaled $229 million or 55.9 percent while services provided to the aged totaled $181 million or 44.1 percent. About 85 percent of the total medical expenses in behalf of the disabled ($195 million) were covered by Medicaid; in contrast, only 30 percent (55 million) of the outlays for the aged were covered by Medicaid.

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[3]Medicaid utilization by congregate care residents and residents of chronic care facilities are examined in detail in three earlier reports. See Miles Storfer, Use of Medical Services by Congregate Care Residents (New York City Human Resources Administration, Office of Policy and Economic Research, March 1982); "Medicaid Use Among Nursing Home Residents," Medicaid Data Report: July-December 1981 (New York City Human Resources Administration, Office of Policy and Economic Research, June 1982); and Miles Storfer and Kathryn Nocerino, Characteristics of the Medicaid-Eligible Chronic Care Population (New York City Human Resources Administration, Office of Policy and Economic Research, October 1981).

Table 1

TOTAL COST OF MEDICAL SERVICES TO SSI RECIPIENTS
LIVING IN THE COMMUNITY
1980 (in Million Dollars)[a]

Category	Total Expenditures	Percent	Medicaid Covered	Percent	Medicare Covered	Percent
Aged	181	44.1	55	22.0	126	78.8
Disabled	229	55.9	195	78.0	34	21.2
Total	410	100.0	250	100.0	160	100.0

[a]Figures exclude cost of home care services.

Based on sample cases, total medical spending (Medicare and Medicaid) for the aged SSI population averaged $1758 per eligible person annually. A high proportion (86 percent) of the sampled recipients had Medicare coverage which paid over two-thirds (69.8 percent) of the costs of medical services for aged SSI recipients. Medicaid expenditures averaged $531 per eligible person annually (see Table 2).

Table 2

ANNUAL AVERAGE SPENDING PER ELIGIBLE SSI RECIPIENT
LIVING IN THE COMMUNITY[a]
1980

Program	Aged		Disabled	
	Dollars	Percent	Dollars	Percent
Medicaid	531	30.2	1,771	85.2
Medicare	1,227	69.8	308	14.8
Total	1,758	100.0	2,079	100.0

[a]Figures exclude cost of home care services.

Appendix

2

No. 81-1374

Office - Supreme Court, U.S.
FILED
NOV 2 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1983

BARBARA BLUM, individually and in her capacity as Commissioner of the New York State Department of Social Services,

Petitioner,

—against—

ELLEN STENSON, individually and on behalf of all other persons similarly situated,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' LODGING

KALMAN FINKEL
Attorney-in-Charge
THE LEGAL AID SOCIETY
Civil Division

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Civil Appeals & Law Reform Unit

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1983 ANNUAL REPORT

The Legal Aid Society 1983 Annual Report

The Legal Aid Society is a private, non-profit legal services agency dedicated since 1876 to providing quality legal representation to New Yorkers who cannot afford to pay a lawyer. The Society, governed by a board of directors, has a full-time staff of nearly 700 attorneys who provide legal assistance to more than 250,000 people a year in all courts in New York City, in the state and federal appellate courts and in the United States Supreme Court. While the Criminal Defense and Juvenile Rights Divisions and the Criminal Appeals Bureau as well as certain special projects are supported by government funds, the Civil Division is supported primarily by contributions from law firms, foundations and individuals. The Volunteer Division is supported by a combination of government and private funds.

A number of friends of the Society have donated their services to help make this report possible. The Society is grateful for their generosity.

Michael A. Cooper

Report of the President

Each year in the life of an institution, whether it be governmental, business, educational or charitable, appears to those entrusted with its stewardship to bring new crises and to pose new challenges. And so it has seemed, and I believe has in fact been, during this past year, the one hundred seventh, in the institutional life of The Legal Aid Society.

One year ago, the Society was unknowingly on the eve of a strike by its staff attorneys, which lasted ten weeks and caused a severe disruption in the Society's delivery of legal services to the poor of New York City. As I write, one year later, the Society and the criminal justice system of which it is so integral a part confront a new crisis, a staggering and increasing backlog of criminal appeals: a defendant today may have to wait three years or more to have his appeal briefed, argued and decided by the Appellate Divisions in the First and Second Departments.

Crisis and challenge, however, when answered with intelligence, thoughtfulness and resolution, can make an individual or institution stronger and better able to cope with the crises and challenges of the future. This lesson has, I believe, been demonstrated by the response of the Society's administration and the staff attorneys union to last winter's strike. As a critical element in its resolution, they formed a joint committee to study working conditions, and during the past six months, that committee has addressed, in deliberate and responsible fashion, a number of subjects ranging from training programs to individual lawyer caseloads. Suggestions offered by that committee should lead to more effective representation of the Society's clients and to a more fulfilling professional life for the Society's staff lawyers.

I fervently hope that the criminal appeals backlog will receive a similarly constructive response. As the Society takes steps to augment its own productivity in this area, it is simultaneously sending a call to the private Bar, from the largest law firms to individual alumni of the Society's Criminal Appeals Bureau, to act as co-counsel in criminal appeals. The private Bar in New York City has a long and proud tradition of volunteerism, of which the Society's own Volunteer Division, which handled 1,500 cases this past year through the contributed services of 400 private attorneys, is the outstanding current example. I trust

that the Bar will respond generously, in keeping with that tradition, to this latest call upon its time and talents. The fiscal and philosophical conservatism that have prompted a reduction in federal funding of, and other limitations upon, legal services programs, coupled with budgetary constraints at state and local governmental levels, will necessitate increased reliance on volunteer services in the future. The present criminal appeals backlog furnishes an occasion – the gravity of the situation keeps me from calling it an opportunity – to broaden and strengthen the base of volunteers.

To this point, the reader might think that The Legal Aid Society has bravely stood under siege this past twelve months, with no respite in moments of pride and joy. That, happily, has not been the case. As the following sections of this annual report spell out in informative detail, the Society and, more importantly, its legion of clients have achieved notable successes. I will highlight only two.

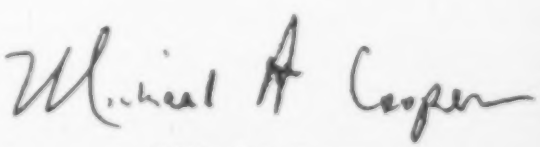
First, the advertising campaign which I announced in last year's report came to fruition with the appearance of an advertisement, brilliantly conceived and skillfully executed by Ogilvy & Mather, in *The Wall Street Journal* this June and more recently in *Time*, *Newsweek*, *Money Magazine*, and other widely circulated periodicals. The ad tells the story of the collaboration of the Society and MONY in the formation and growth of the Fort Apache Youth Center. We are hopeful that this illustration of fruitful collaboration between the Society and the business community in neighborhoods of the City, will inspire other corporations to support some of the Society's many projects aimed at vindicating the rights, and thereby ameliorating the condition, of the City's poor.

Second, the Society's Juvenile Rights Division celebrated its twenty-first anniversary, attaining the age of majority, with a day-long conference in May, at which four hundred participants, including City Council President Carol Bellamy, discussed in both speeches and workshops the changing nature of juvenile law and practice, an area in which the Juvenile Rights Division can justly claim to have been a continuing pioneer. When one contrasts the plight of abused and neglected children twenty-one years ago with the rights and representation afforded to them today, it is simply impossible to maintain an unrelieved gloomy prospect of the future.

The Society bade farewell to two friends this year, one under happy, the other sad, circumstances. Last month, Judith Kaye, a Director of the Society since 1976, and a Vice-President since 1981, was sworn in as Associate Judge of the New York Court of Appeals. The Society has benefited immeasurably from her intelligence, judgment and compassion, which henceforth will benefit all of the people of this State. In May, Whitney North Seymour, a former President of the Society and a Director for 43 years, passed away. He may no longer be with us in person, but it will be a long, long time before we cease to be sustained by his staunch spirit and the wise counsel he gave the Society over the years.

It is common, if not customary, for a message such as this to single out for praise and gratitude those who have made a special contribution during the past year to an institution, but without unduly prolonging this report I cannot do so, for they are too numerous to name. It is the singular source of strength of The Legal Aid Society that it draws support, in both services and financial contributions, from so many individuals and organizations: its own professional and non-professional staff, its administration, a Board of Directors drawn from many segments of the community, the private Bar (both law firms and individual lawyers), the business and financial community, the volunteer members of the Civil Support Division, and others. Each makes his, her or its separate contribution to the Society, whose continuing vitality is the product of all their efforts.

My presidency closes with a conviction, far stronger than when it began two years ago, that The Legal Aid Society will continue, whatever the crises of the moment, to provide dedicated, effective and efficient representation to the disadvantaged of New York City. Individual officers of the Society may come and go, but the tradition of commitment to high-quality legal representation of the poor that has marked the Society's mission over the years will abide and flourish.



Michael A. Cooper
President

Archibald R. Murray

Report of the Executive Director and Attorney-in-Chief

In 1982-83, The Legal Aid Society launched a number of important initiatives aimed at strengthening the organization and meeting the challenges that lie ahead. Among them have been increased training for supervisory staff in the law and practice of labor management relations, conduct of a personnel attitude survey performed by a team of outside academicians and the launching of a joint management and union committee to examine questions of workload and working conditions.

Although none of these initiatives has yet been brought to conclusion, they all show promise of being significant contributors to the future well-being of the Society.

The training of supervisory staff has been conducted in workshop fashion and has brought staff together across divisional lines in combinations that would not normally occur. The opportunity to hear authoritative presentations of the subject matter and examine issues with colleagues in this fashion is having an important and positive effect.

The personnel attitude survey is a new venture for the Society. However, after a number of conversations with persons who are knowledgeable about personnel and industrial relations, we concluded that the time was right for such an inquiry. In this connection it should be noted that the Society presently employs 1,400 full-time staff members and provides service from 22 separate building locations in the City of New York. Two members of the faculty of New York University School of Business have undertaken the task and should complete their assignments by year's end. If the findings, derived from questionnaires administered to all employees, show clear and unambiguous needs, they will go a long way towards shaping future policy and practices.

Early in 1983, the administration of the Society and the leadership of the Association of Legal Aid Attorneys established a joint 14 member committee to explore questions of workload and working conditions as they affect the legal staff of the Society. The committee has divided its work into

three principal areas of concern and given each to a separate sub-committee for detailed exploration. The first area identified for special attention has been attorney training and certification. The sub-committee functioning in this area has made substantial progress and has produced a curriculum for intermediate training of Criminal Defense Division attorneys. The second sub-committee has been addressing workload and has undertaken a careful analysis of workload in the Juvenile Rights Division which, when completed, will be followed by similar efforts in other divisions. The third sub-committee, which has been concerned with the impact of court organizational arrangements upon the Society's staffing, has been wrestling with the problems created in Manhattan for the Criminal Defense Division by the decision of the courts to conduct arraignments in the Criminal Court 24 hours a day, everyday of the year. The joint committee has approached its assignments with care and an impressive sense of responsibility. Even if the committee is not able to solve every problem assigned to it, the effort will have been a valuable experience for all concerned.

These are but three illustrative examples of finding new ways of working together. Not surprisingly, self study is an important element of each. As the Society positions itself to meet the challenges of the mid-1980's, self knowledge, determination and an ability to work successfully together will be critical elements of the prescription for success. The work of the year just ended has been an important step in that process of preparing.

Looking ahead, the challenges are unmistakably clear. At the national level, the future of the Legal Services Corporation, an important source of funding for our Civil and Volunteer Divisions, remains unresolved in a tug of war between the President and the Congress. Locally, the volume of criminal appeals assigned to the Society has been growing phenominally each year and has resulted in a serious backlog of cases. Other developments, as noted elsewhere in this report, have meant more work for our staff and frequently, more serious consequences for our clients. To succeed in the face of these challenges, the Society must develop alternate funding sources to support some of its work as well as find new and more efficient ways of doing the work that must be done on behalf of its clients. Some steps may entail exploring new technology. Others may require resort to strategic planning. Yet others may require careful reappraisal of how we apply resources to the solution of important problems of service delivery. Nevertheless, in every instance, success on these issues will require self knowledge, determination and teamwork. In this respect, 1982-83 has been an excellent opportunity for preparation.

Archibald R. Murray
Executive Director and Attorney-in-Chief

Tribute to Whitney North Seymour, Sr.

Whitney North Seymour, Sr., a leader of the organized Bar who devoted 43 years of service to The Legal Aid Society, died on May 21. The entire Legal Aid family suffered a tragic loss at the death of a great man who had given so much of himself to the cause of equal justice for all.

The Board of Directors unanimously adopted the following resolution in tribute to Mr. Seymour:

WHEREAS, Whitney North Seymour for the past sixty years served the legal profession and the community with the highest distinction in a host of capacities;

WHEREAS, among those capacities was devoted service to The Legal Aid Society as a Director for the past forty-three years and as President from 1945 to 1950;

WHEREAS, Whitney North Seymour's continuing support of the Society and wise counsel to this Board and its predecessors, as well as to the Society's officers, management and staff, have sustained them for four decades and have borne personal witness to his oft-stated conviction that the availability of justice must not depend on the means of litigants;

NOW, THEREFORE, BE IT RESOLVED that the Board of Directors of The Legal Aid Society celebrates its good fortune in having been the beneficiary of the judgment, guidance and dedication of this best of lawyers and of men, and extends its sympathies to Whitney North Seymour's family.

The facing page carries a tribute to Mr. Seymour which was written by Louis Auchincloss on the occasion of the 1979 Servant of Justice Award Dinner which honored Mr. Seymour.

Whitney North Seymour with Michael A. Cooper and Cissie Aidinoff.

Whitney North Seymour and Helen L. Buttenwieser.

Alexander D. Forger (from left), Harold H. Healy, Jr. and Archibald R. Murray with Mr. Seymour before the 1979 Servant of Justice Dinner.

Whitney North Seymour is surrounded by his family during the reception before the 1979 Servant of Justice Award Dinner honoring Mr. Seymour.

Whitney North Seymour

Recipient of the Servant of Justice Award of The Legal Aid Society

Many of the great lawyers honored by bar associations and legal aid societies have achieved their primary renown more in public life than in the practice of law or in their work for legal causes. Whitney North Seymour is exceptional in being famous primarily as a practicing lawyer and as one who has taken a leading part in making legal services available to all. He likes to quote Learned Hand, who said that the first commandment for lawyers should be: "Thou shalt not ration justice." No attorney in America has done more to implement this precept.

Seymour was born in Chicago in 1901. He received his AB degree from the University of Wisconsin in 1920 and his LLB from Columbia in 1923. He joined the firm of Simpson, Thacher & Bartlett in 1923, at the exiguous salary of $1,500 a year. Even in those pre-inflationary days this was hardly adequate for raising a family, Seymour added to the burden of a hardworking associate the task of teaching wills, sales and corporations at night at New York University Law School. His public, as opposed to his private, career in law began when he joined the Association of the Bar of the City of New York in 1927 and adopted as his particular interest legal representation for the poor and the unpopular.

In 1931 he resigned from his firm, of which he had been made a partner in 1929, to become Assistant Solicitor General. This was the only government job that Seymour ever held. He returned to Simpson, Thacher & Bartlett in 1933 and has remained with that firm ever since. His specialty has been trial and appellate law, and he has argued more than fifty cases in the United States Supreme Court.

Seymour's services in the cause of American jurisprudence have brought him to the presidency and chairmanship of so many distinguished organizations that it would be tedious to list them. Suffice it to say that he has been President of the American Bar Association (1960-61), President of the Association of the Bar of the City of New York (1950-52), President of the American College of Trial Lawyers (1963-64), President of The Legal Aid Society (1945-50), President of the American Bar Foundation (1960-64), President of the Institute of Judicial Administration (1968-79), President of the Joint Conference on Legal Education in the State of New York and Chairman of the International Legal Center.

His interests have covered almost the entire field of practice of the law, but his particular concerns have been representation of the poor and unpopular, reorganization of the courts and simplification of their procedures, and improvement of the quality of judges. He was largely responsible for making the approval of the American Bar Association a necessary factor in the appointment of the Federal judiciary, and it was principally through his efforts that the American Bar Association passed a resolution that every defendant, however unpopular, should be represented.

In the hottest days of the McCarthy period, Seymour urged the American Bar Association to pass a resolution calling for fair treatment of witnesses in Congressional investigations. This made him a target of the witch hunters, who attacked him viciously as a dangerous radical because he was a director of the American Civil Liberties Union and had once defended a red! The latter turned out to be Angelo Herndon, a black communist who had been indicted for inciting insurrection and who was successfully defended by Seymour in 1937.

Seymour likes to quote John W. Davis who, when asked how it felt to argue a case before the United States Supreme Court at the age of 80, replied: "I'm glad to find that there's still a tune in the old violin." He hopes to be able to say this of himself. We have no doubt that he will.

Louis Auchincloss

Ad Campaign

Under the leadership of Maurice N. Nessen, a Vice President and Chair of the Communications Committee, and Kenneth Roman, President of Ogilvy & Mather, a Director and Co-Chair of the Committee, The Legal Aid Society has begun a new, innovative advertising campaign.

The advertising campaign has been developed through the generous *pro bono* efforts of Ogilvy & Mather. The Society extends its sincere gratitude to Mr. Roman, his agency and his staff.

The campaign announces a new kind of partnership between the Society and the business community. The goal of the campaign is to persuade New York City corporate leaders to sponsor and support specific Legal Aid projects and to urge their legal staffs to donate time.

The first ad appeared in THE WALL STREET JOURNAL on June 29. The ad, which is reprinted on the facing page, tells of one of the joint undertakings: a youth center in the South Bronx. The Society, through its Volunteer Division, helped The Mutual Life Insurance Company of New York (MONY) sponsor this Center by training MONY lawyers to do the kind of nonprofit work our lawyers usually undertake.

A shorter version of the ad appeared in four publications thus far: TIME, NEWSWEEK, MONEY and SPORTS ILLUSTRATED.

The Society is grateful to Henry S. Romaine, President of MONY; Michael A. Cohen and Marjane Cloke, members of his staff; and MONY's corporate law department for their continued support of the Society's work.

Members of the Ogilvy & Mather team who made this campaign possible through their creativity, enthusiasm and outstanding efforts include: Elaine Reiss, senior vice president and general counsel; Jay Jasper, senior vice president and creative director; Jon Jackson, vice president and copy group head; Penny Bernstein, vice president and management supervisor; Chris Armstrong, art director and Linda Fidelman, vice president and assistant media director.

"It didn't take an army of cops to help bring law and order to the South Bronx. Just two guys named George."

Henry S. Romaine, President of MONY, The Mutual Life Insurance Company of New York, talks about his company's work with the Fort Apache Youth Center and The Legal Aid Society.

The Legal Aid Society would like to thank Hank Romaine and MONY for all their support.

"In the winter of 1974, two policemen in the 41st Precinct found a new way to stop gang wars. Officer George Hankins, onetime heavyweight champion, U.S. Air Force, challenged two gang leaders into slugging out a problem—man to man. After two rounds, they found out how little they knew about real fighting. George offered to teach them.

With his partner, Officer George Pearson, he set up a gym in an abandoned warehouse. The kids started boxing, stopped having gang wars.

And the Fort Apache Youth Center was born.

In 1975 we at MONY heard about the work being done by the two Georges and decided we wanted to help. The two Georges knew kids. We had all the business skills the Youth Center needed to survive: accounting, fund raising, taxes, real estate and corporate law.

But like most professional and business people, we didn't know grass-roots groups. We didn't understand their problems, their needs or their language. Our lawyers hadn't dealt with their kind of legal problems.

So we called on a group that really knows community organizations, The Legal Aid Society.

How to stop law cases before they start.

If you've heard of The Legal Aid Society, it's probably as the people who supply lawyers for poor people. This is accurate, as far as it goes. But it doesn't go nearly far enough.

About 2,000,000 New Yorkers qualify for Legal Aid services. All the lawyers in Wall Street and Midtown combined couldn't handle that many clients on a case-by-case basis.

So Legal Aid has become deeply involved in community groups. Legal Aid has discovered—where there is a strong sense of community, and every citizen feels he has a right to justice, dignity, and an even break, there's less crime. Less juvenile delinquency. Fewer disputes end up in court.

That's why Legal Aid now provides legal services for hundreds of community groups, tenants' groups, and grass-roots organizations of every kind. They are now looking for corporate support to take on even more.

No crime, no dropouts.

The Fort Apache Youth Center is the perfect example of what a community group can do to reduce crime, reduce Legal Aid's potential case load, and strengthen an entire neighborhood.

Today there is virtually no street crime within a two-block circumference of the clubhouse.

There are few dropouts among the 400 teenagers who use the Center—largely because members must maintain a "C" average.

A number of alumni have gone on to college or further technical training. Five have become Golden Gloves champions. Thousands of Bronx kids are leading productive lives.

A small price for some large gains.

MONY's first contribution to the Fort Apache Youth Center was to pay off the mortgage on their clubhouse. Presenting that check really made us feel good. Soon we felt even better. As MONY employees began volunteering their time to help out the Center's legal, accounting and fund-raising activities, there's no question that their morale and attitude toward MONY improved significantly.

On top of all this, our involvement with the Youth Center has had an extremely positive impact on our public relations. The Fort Apache story has been on radio and in newspapers throughout the metropolitan area and has put us on almost every local news program on every major channel. We've also been featured on national news programs like PM Magazine.

And we've made new friends throughout the business community—especially among other corporations which also support Fort Apache.

It's been so successful, we're not only sponsoring a second group, but have asked the Legal Aid people to find us more."

We're fighting for justice on at least five fronts. We need your help too.

By law, we must represent poor people who face criminal charges, and the government pays us to do it. But we're dependent on private contributions for most civil work we do. We need money and help with all these projects.

1. **Decent homes for Harlem.** Our East Harlem office has helped 200 tenant groups acquire, renovate and run their own buildings. We'd like to help more people get decent housing and safer neighborhoods. Especially in Coney Island, Fort Greene, The Bronx.

2. **Sponsor your own youth center.** We know of at least 100 community groups who could do as much good as effectively as Fort Apache. If you adopt one, we'll work with your lawyers in nonprofit work. And if you don't think this has its rewards for you, just ask Hank Romaine of MONY.

3. **Operation Outreach.** We've been bringing legal aid to senior citizens too infirm to travel, by conducting legal clinics in community centers scattered throughout Brooklyn. With $450,000 we could make this service city-wide.

4. **Save old people from the humiliation of illegal evictions.** Our Brooklyn Office for the Aging, started under a federal grant, has demonstrated that good legal services can help old people lead independent lives with minimal assistance—even upgrade the care they get in nursing homes. With money, we could copy this program in all the boroughs.

5. **Speeding up the law.** Through a pilot program funded by the Revson Foundation, we've proved that Social Security complaints and similar problems can be processed quickly and fairly—by extensive use of paralegals. Because of this program we've tripled the volume of benefits work we can do. Now—we'd like to try this approach on housing cases—where sadly, we're forced to turn down three people for every case we take on.

No wonder you're thriving: you work in the greatest city in the world.

At Legal Aid, we firmly believe in New York. We'd also be the first to admit New York has its problems. But we do not think the city will solve its problems simply by throwing money at them. No project, no matter how big—no program, no matter how costly can take root unless it's nourished by a strong sense of community. Please help us keep that spirit alive and flourishing. Give to Legal Aid. You'll join MONY, Western Electric, the Astor Foundation, Mobil, Exxon and other very distinguished companies.

Support The Legal Aid Society

Because every New Yorker deserves justice, dignity, and an even break.

Please help. Write: Archibald R. Murray, 15 Park Row, New York, NY 10038.

Fund Raising

Each year, the Society seeks the financial assistance of the private sector so that it can continue to provide free civil legal services to the many New Yorkers who have no money for attorney's fees. This year's response to our appeals, particularly in light of the cutback in funding from the Legal Services Corporation, has been most encouraging. A total of just over $3.8 million was raised from the legal community, corporations, foundations and philanthropic individuals. This represents an increase of almost 25 percent over last year.

Once again the City's law firms responded generously to the Society's increased need for operating monies for the Civil Division. Almost 61 percent of the total amount raised came from law firms. Twenty-eight firms contributed at the Sustaining level ($400 or more per lawyer); six at the Sponsor's level ($300-$399 per lawyer) and nine at the Benefactor's level ($200-$299 per lawyer).

Corporations, foundations and private grants amounted to over 13 percent; law firm associates and members of corporate legal departments donated more than five percent and gifts from individuals provided almost six percent. Our United Way allocation added almost seven percent and bequests comprised almost four percent. The Servant of Justice Dinner added almost four percent. We are most appreciative of this support.

The sixth Annual Servant of Justice Dinner honored Helen L. Buttenwieser in recognition of her life-long endeavors to defend human rights and her commitment to the principle of equal justice for all. Mrs. Laurence A. Tisch served as Dinner Chairman and Elizabeth Drew, journalist and television commentator, provided the keynote address. Cissie Aidinoff, a Vice President of the Society, chaired the Dinner Arrangements Committee. This year's Dinner raised over $136,000, the highest amount ever raised by this event.

The Associates Campaign, which involves the associates at 135 participating law firms, raised a record-breaking $204,000. John A. Shutkin, Campaign Chairman, as well as Steven F. Miller and Paul T. Shoemaker Co-Chairmen, are to be congratulated for their successful fund raising efforts on behalf of the Society. The Society is also grateful to the Vice-Chairmen, the solicitors in the various law firms and the more than 3,000 generous contributors who made this campaign such a success.

Corporate contributions were larger than ever before. The Society is grateful to the corporate community.

Private foundation grants provided additional funds for the Civil Division's operating budget.

Next year promises to be the severest test yet for the Society's Development Committee chaired by Peter M. Ward, with Victor M. Earle, III, serving as Vice Chairman. With legal services for the poor already overburdened and the expectation of further cuts in grants from the Legal Services Corporation, the Society will be even more dependent upon private philanthropy for its civil legal work.

On behalf of our clients, our thanks to all of those individuals, corporations, foundations and members of the legal community who gave so generously this year. The Society hopes it can depend on your continued participation in our mission of providing free legal assistance to the indigent.

The 1982 – 83 Honor Roll of Law Firms

New York City's leading law firms have helped support the Society through their generous contributions. The total amount contributed by the firms listed below amounted to $2,256,115. The Society is grateful for this essential support.

Sustaining Level ($400 or more per lawyer)

Alexander & Green
Breed, Abbott & Morgan
Cahill Gordon & Reindel
Chadbourne, Parke, Whiteside & Wolff
Cleary, Gottlieb, Steen & Hamilton
Cravath Swaine & Moore
Davis Polk & Wardwell
Debevoise & Plimpton
Dewey, Ballantine, Bushby, Palmer & Wood

Donovan Leisure Newton & Irvine
Fried, Frank, Harris, Shriver & Jacobson
Hughes Hubbard & Reed
Kaye, Scholer, Fierman, Hays & Handler
Kramer, Levin, Nessen, Kamin & Frankel
London & Buttenwieser
Milbank, Tweed, Hadley & McCloy
Morgan, Lewis & Bockius
Olwine, Connelly, Chase, O'Donnell & Weyher
Paul, Weiss, Rifkind, Wharton & Garrison
Robinson, Silverman, Pearce, Aronsohn & Berman
Shearman & Sterling
Simpson Thacher & Bartlett
Skadden, Arps, Slate, Meagher & Flom
Sullivan & Cromwell
Wachtell, Lipton, Rosen & Katz
Webster & Sheffield
White & Case
Winthrop, Stimson, Putnam & Roberts

Sponsoring Level ($300 to $399 per lawyer)

Cadwalader, Wickersham & Taft
Davidson, Dawson & Clark
Gelberg & Abrams
Goldfarb & Fleece
Lord, Day & Lord
Rivkin Sherman and Levy

Benefactor Level ($200 to $299 per lawyer)

Brumbaugh, Graves, Donohue & Raymond
Carter, Ledyard & Milburn
LeBoeuf, Lamb, Leiby & MacRae
Patterson, Belknap, Webb & Tyler
Proskauer Rose Goetz & Mendelsohn
Rogers & Wells
Rosenman Colin Freund Lewis & Cohen
Turk, Marsh, Kelly & Hoare
Weil Gotshal & Manges

Many of the firms that make these generous monetary contributions also make substantial contributions of their time. The Society wishes to acknowledge with appreciation the *pro bono* legal services in the area of labor relations and other matters rendered by Patterson, Belknap, Webb & Tyler and Proskauer Rose Goetz & Mendelsohn. We also wish to thank those firms which have encouraged their lawyers to work with the Society's Volunteer Division. The hours spent by these volunteer attorneys greatly increase our capacity to serve the poor.

Honor Roll of Corporations and Foundations

The Society has been fortunate to receive increased support this year from corporations and private foundations. These restricted capital and project grants, as well as grants for general operating expenses, have been of great assistance in our efforts to make our offices more efficient and functional and to provide adequate access for handicapped and elderly individuals seeking our services. The Society's Administrative Law Unit, which was established through a major grant from the Charles H. Revson Foundation, Inc., has added community education programs for training law leaders to act on behalf of community members at the initial stages of disputes. The Civil Division continues to expand its training program for new lawyers through the generosity of the Vincent Astor Foundation. We are deeply grateful for the generosity of the corporate and private foundation communities.

Corporations and Foundations Contributing $25,000 or more

The Vincent Astor Foundation
The Clark Foundation
The Ambrose Monell Foundation
Charles H. Revson Foundation, Inc.
The Scherman Foundation, Inc.

Corporations and Foundations Contributing $10,000 to $24,999

The Louis Calder Foundation
Ford Foundation
Freeport-McMoRan Inc.
Gibbs Brothers Foundation
Lucy Wortham James Memorial of the New York Community Trust
Charles S. Keene Foundation
Edith and Herbert Lehman Foundation, Inc.
The Leonhardt Foundation, Inc.
Clara L. MacBeth Fund of the New York Community Trust
Kathryn and Gilbert Miller Fund, Inc.
The New-Land Foundation, Inc.
New York Foundation
Philip Morris Incorporated
Rockefeller Brothers Fund
The Seth Sprague Educational and Charitable Foundation
van Ameringen Foundation, Inc.

Corporations and Foundations Contributing $5,000 to $9,999

American Can Company
Harriet Ames Charitable Trust
M. Alida Bonynge Memorial Fund of the New York Community Trust
Exxon Corporation
The Hycliff Foundation, Inc.
The J.M. Kaplan Fund, Inc.
Albert A. List Foundation Inc.
Peat, Marwick, Mitchell & Co.
Price Waterhouse
Revlon Inc.
Schlumberger Foundation, Inc.
The Pfizer Foundation, Incorporated
E.M. Warburg, Pincus & Co., Inc.

The Society would also like to thank the other corporations and foundations who supported the sixth Annual Servant of Justice Dinner, making it the most successful thus far.

Servant of Justice Award

Former Gov. Hugh Carey attended the Servant of Justice Dinner honoring Mrs. Buttenwieser.

Well-wishers gather around Mrs. Buttenwieser and Mr. Cooper after the Servant of Justice Dinner.

Arthur L. Liman and Alexander D. Forger at the reception before the Servant of Justice Dinner honoring Helen L. Buttenwieser.

Benjamin J. Buttenwieser converses with Elizabeth Drew, guest speaker, and Mrs. Laurence A. Tisch, Dinner Chairman, during the reception preceding the Servant of Justice Dinner.

Alexander D. Forger, Chairman of the Board, presents the scales of justice to Helen L. Buttenwieser, recipient of the 1983 Servant of Justice Award.

With Mrs. Buttenwieser are (from left) Archibald R. Murray, Mrs. Laurence A. Tisch, Alexander D. Forger, Elizabeth Drew and Michael A. Cooper.

Civil Support Division

The past year was an innovative and profitable one for the Civil Support Division, chaired by Mrs. James B. Liberman and co-chaired by Mrs. Allan B. Ecker. The volunteers in the Division raised $242,817 for The Legal Aid Society. Every benefit was completely sold out.

Legal Aid Ball

The Legal Aid Ball, held in October 1982, raised a record-breaking $90,272 net profit. The ball committee was chaired by Mrs. Joseph Kartiganer and co-chaired by Mrs. Harvey Miller with Mrs. John McEnroe as Secretary.

Contributions

Contributions not attributable to any special event climbed to $81,380 in 1982-83. Mrs. John D. Van Wagoner, who celebrated her 86th birthday this year, inaugurated the special gift program and year after year has steadfastly supported it.

Theatre Benefit "Merlin"

Mrs. James G. Frangos served as Chairman of the Theatre Benefit, *Merlin*. Her Co-Chairman was Mrs. Donald J. Robinson. Dinner Chairman was Mrs. Arthur Fleischer, Jr., and Mrs. James F. Gleason, Jr., was Secretary. The benefit netted $34,492.

The Attorney's Appetite

The Legal Aid Cookbook enjoyed a small renaissance when *Cuisine*, a national magazine about "fine food and gracious living" printed an article about grass roots American cooking and called *The Attorney's Appetite* "one of the pleasantest of the grab-bag cookbooks". The net profit was $1,436 and Mrs. Henry Harfield, long-time Chairman of the enterprise, was delighted to supervise the shipping of the cookbooks across the country.

Thrift Shop

After many years with 10 other charities at Everybody's Thrift Shop, 330 East 59th Street, the LAS Thrift Shop must look for new space and associations because the lease of the shop will expire in December. Under the able chairmanship of Mrs. John F. Lang, with Mrs. Guy C. Dempsey, Co-Chairman and Mrs. Nicholas Coch and Mrs. L.P. Wragg, Jr., Vice-Chairmen, the net profit was $26,781, in spite of the uncertainties about the thrift shop's future. The volunteers under the transition Chairmanship of Mrs. Dempsey have made plans to join three other charities and start a brand-new boutique on the upper West Side.

Deen Liberman (standing), Chairman of the Civil Support Division, with Marilyn Wragg.

Tournament of Champions

Chosen to attract younger lawyers of New York law firms while continuing to appeal to the regular benefit audience, the Tournament of Champions at the West Side Tennis Club in Forest Hills added many new faces from law firms and the Legal Aid staff to those who invariably support Civil Support Division events. Mrs. Paul A. Crotty and Mrs. Theodore Kozloff (also Chairman of the Junior Civil Support Committee) were Chairmen of the event. Mrs. Crotty's Co-Chairman was Mrs. Richard Simmons. Mrs. Kozloff's Co-Chairmen were Chris Hikawa, Esq. and Katherine Flickinger, Esq. The event was completely sold out and netted, in addition to many new friends $8,352 for the Society's Civil legal work.

Records

Working diligently at the loneliest job our volunteers undertake, Mrs. Thomas S. Monfried has continued to keep the records in order and the lists of contributors and benefit participators up-to-date.

Juvenile Rights – the Age of Majority

At the request of Lenore Gittis, Attorney-in-Charge of the Juvenile Rights Division, Civil Support Division volunteers formed a committee for the Symposium to welcome and register the many participants who gathered to honor Charles Schinitsky and to celebrate the 21st birthday of the Juvenile Rights Division. Volunteers included: Mrs. Branston T. Duckworth, Jr., Mrs. Allan B. Ecker, Mrs. John F. Lang, Mrs. James B. Liberman, Mrs. Thomas S. Monfried, Mrs. Donald J. Robinson, Mrs. Richard Wincor and Mrs. L.P. Wragg, Jr. Continuing a heart-warming trend, cooperation between staff and the Civil Support Division has continued to grow.

The Policy Committee of the Civil Support Division warmly thanks the New York law firms, the staff and the Board of Directors of The Legal Aid Society for their continued loyal support.

Civil Support Division Policy Committee 1983-1984

Mrs. Stanley S. Arkin
Mrs. Walter G. Dunnington, Jr.
Mrs. James G. Frangos
Mrs. John F. Lang
Mrs. John E. Merow
Mrs. Peter P. Mullen

Mrs. Charles Pettit
Mrs. Paul C. Saunders
Mrs. Benjamin R. Shute
Mrs. John Anthony Smith
Mrs. George J. Wade
Mrs. J. Marshall Wellborn, Jr.
Mrs. Dana M. Raymond, Secretary
Mrs. Richard J. Hiegel, Co-Chairman
Mrs. Allan B. Ecker, Chairman

Ex Officio:
Mrs. James B. Liberman

Advisors:
Mrs. M. Bernard Aidinoff
Mrs. Leslie H. Arps
Mrs. Samuel E. Gates
Mrs. Powell Pierpoint
Mrs. John D. Van Wagoner

Members of the Civil Support Division address invitations for the Annual Ball.

A History Of Justice For The Poor

For 107 years, The Legal Aid Society has provided free legal representation to people too poor to pay a lawyer — helping them solve their problems within the law.

Founded by a group of civic-minded merchants and lawyers, The Legal Aid Society grew from one office with a part-time lawyer in its first year to a staff of 700 full-time attorneys who represent New York City's poor who do not have the financial ability to pay the services of a lawyer in private practice.

Our clients are the poor with overwhelming problems they cannot solve alone, who live under laws they often do not understand and with a bureaucracy they cannot comprehend.

The Society over the years has creatively adapted to the changing needs of the poor in New York City. In its early years, the Society waged vigorous campaigns against the impressment of seamen and the abuse of children in sweatshops.

Today, the Society's legal staff provides representation to some 200,000 persons each year in all courts in New York City, in the state and federal appellate courts and in the United States Supreme Court.

But as the Society continues in its second century of service, a cruel reality emerges. The very economic conditions that increase the need for legal services for the poor also make it more difficult to obtain adequate funding.

Legal services cost money. As the numbers of poor people requiring our help increase, the Civil and Volunteer Divisions need more money to perform the services.

We all have a stake in justice, but we need your help more than ever.

The Society's Harlem Branch in 1912 was located at 2022 Lexington Avenue and served Harlem and the Bronx.

The Society's Brooklyn Branch, which was opened in 1895, was at 303-305 Washington Street, Brooklyn.

The Branch for Seamen was at 1 Broadway.

In 1912, the main office of The Legal Aid Society was located at 239 Broadway.

The Immigration Branch was at 127 Madison Avenue.

Civil Divison

Faced with a difficult economy and a national administration openly hostile to civil legal services for the poor, the Civil Division has continued to seek new ways to deliver more and better legal representation to the ever-growing ranks of the needy. While continuing to furnish one-on-one representation to individuals faced with legal problems in the areas of housing, public benefits, family law, consumer disputes, bankruptcies and discrimination, the Civil Division has continued to initiate selected high-impact suits and expand its efforts in the area of community development to enable a greater number of individuals to benefit from its work.

Community Education

Following are a few highlights of our activities in community education over the past year.

The centralized Administrative Law Unit (ALU) received additional financial support from the Charles H. Revson Foundation, permitting it to establish a community-advocate project designed to develop and conduct education programs and to select and train advocates to act on behalf of community members in legal disputes at the initial administrative stages, where the vast majority of problems are solved. Another major thrust of this program is to develop and distribute innovative self-help legal manuals which will eventually enable many of our clients to represent themselves effectively before administrative tribunals. Still another is to prepare "How to" pamphlets covering a broad range of problems: public-assistance hearings; applications for Medicaid, food stamps, and emergency grants; what to do if utility services are terminated and how to seek replacement of lost or stolen benefit checks. The ALU is also participating in a housing-information table established by a coalition of various Brooklyn based housing-advocacy groups.

Our Far Rockaway Neighborhood Office has engaged in a similar housing program. Working closely with the Queens Task Force of the Housing Court, it met its initial goal of training individuals to run a tenant-information table five days a week. The next goal is to establish a uniform city-wide procedure for the Housing Court to make it easier for *pro se* litigants to represent themselves. The Rockaway office also participated in training professional nursing home staff and resident-council representatives on the rights of residents in nursing and adult homes.

Kalman Finkel, Attorney-in-Charge of the Civil Division

Our Staten Island Neighborhood Office conducted an all-day seminar on Social Security and Supplemental Security Income disability for members of the Staten Island Women's Bar Association. The purpose was to train the members to represent people of the community in disability cases. The session involved a presentation by one of our staff attorneys on the relevant law, from the initial application for benefits through the last judicial appeal, and concluded with a mock disability hearing conducted by another of our attorneys. Because we are the only legal service office on Staten Island and are unable to handle the great increase in requests for assistance in disability cases, the outreach effort has provided a new referral resource.

The Brooklyn Office for the Aging continued its strong tradition of community involvement. Each year, numerous lectures are given by our staff to professional groups and to senior citizen groups.

The office is also available for extensive telephone consultations.

The Harlem Neighborhood Office has expanded its outreach efforts. The attorneys have accepted speaking engagements and attended meetings throughout the neighborhood at schools, churches, senior citizens groups and tenants' associations. The office is planning to renew a series of community workshops held in past years to educate residents in the areas of housing, consumer law and government benefits.

The Bronx Neighborhood Office continued to act as a resource for a number of community agencies. The office has become deeply involved in a legal-counselling program concerned with spouse abuse.

The Chelsea Neighborhood Office, which for several years has concentrated its attention on the problem of single-room occupants being driven from their homes by gentrification, continued its history of heavy involvement with tenants' groups and tenant-supporting community groups.

Attorneys from the Park Place Office participated in a program sponsored by the Junior League of New York to assist women living in half-way houses with landlord/tenant and government-benefit problems. Others gave lectures advising community groups about methods to improve life in adult homes.

Potential clients are interviewed at the Park Place Office.

Impact Litigation

Class actions constitute another important tool for obtaining legitimate benefits for large numbers of clients through economical use of staff resources. We continue to believe that properly monitored class actions, instituted after attempts at negotiations have failed, constitute a most cost efficient application of our resources.

A major example involves the many homeless families with children who live in the streets, alleys, abandoned structures and parks of our City. Their number has reached such proportions that the problem can only be addressed effectively on a major scale.

Accordingly, Civil Division attorneys from the Civil Appeals and Law Reform Unit; the Rockaway, Park Place, Staten Island offices and the ALU filed a class action in State Supreme Court on behalf of homeless families. The suit seeks relief from the failure of city agencies to provide safe and adequate emergency housing, their failure to help families locate permanent housing and their failure to provide procedural protection where requests for emergency housing assistance and other services are denied or benefits terminated. Many needy families have been placed in appalling conditions: hotels and city-controlled buildings which are unsanitary, violation-ridden and unsafe where young children are exposed to drug traffic and prostitution and where there is no hot water (and sometimes no water at all). Sometimes the families are placed in Newark, depriving the children of schooling because there are no transportation allowances.

We won a interim order in State Supreme Court requiring the City to provide shelter for each family, including adequate bedding, clean towels, enough space, adequate heat and access to a sanitary bathroom. We are presently awaiting decision on our motion for preliminary injunction.

Another class action in the housing field involves the denial of rent subsidies to tenants entitled to them, which, in many instances, automatically deprives the individual of the legal right to a decent, sanitary apartment. Our suit led to class-wide settlements whereby procedures were established enabling a tenant denied rent subsidies to present entitlement evidence on income and household composition to an impartial hearing officer.

The prospect of losing one's apartment is always serious; for the elderly it is especially frightening. The City of New York established a Senior Citizens Rent Increase Exemption program which protects indigent elderly people from rental increases in rent-controlled or rent-stabilized apartments. In response to a landlord-association challenge to these laws, The Legal Aid Society has joined the City in arguing on behalf of continuing these exemptions.

The protection of residents in adult homes has long been in need of improvement. The Civil Division is in the forefront of efforts to improve the quality of life for adult-home residents. Action by our Park Place

office on behalf of a particular client prodded the Legislature into passing a law which outlawed arbitrary evictions from adult homes.

Conrad Johnson (seated), a staff attorney in the Harlem Neighborhood Office, was appointed Attorney-in-Charge of the Office. Conrad discusses a case with Maurice N. Nessen, a Vice President of the Society, who served as a volunteer in the Harlem office for six months in 1980. During that time he established a training program for attorneys.

Individual Representation

Despite the significance of community outreach efforts and class actions, by far the main portion of our daily activity involves one-on-one service to needy persons, covering a broad range of civil legal problems.

The Housing Unit of the Harlem office continued to serve as the tenants' vanguard in one of this City's busiest courts. In a particularly rewarding case, we represented a 79-year-old Greek immigrant who was living under intolerable conditions. During the course of a cold winter without hot water, the tenant's complaints went unanswered. When the landlord asked for a rent increase due to increased fuel charges, the tenant finally sought help from the Society. Our attorneys succeeded in having the landlord complete all repairs and in winning for the tenant a 100 percent rent abatement over a three-year period, plus a substantial punitive monetary award.

The gentrification of Chelsea continued. The Chelsea office's reputation for protecting the rights of tenants is so well established that many landlords are now more willing to negotiate reasonable settlements which fairly meet the needs of the landlord, tenants, and the community.

One of our most gratifying settlements was on behalf of tenants in a building adjacent to Barney's Clothing Store. In return for giving up their apartments, the tenants were relocated to decent quarters and Barney's paid any increase in rent for a 10-year period. In addition, the tenants received moving expenses and a cash award. This settlement was achieved through the active involvement of several community groups.

Family Law Matters

Besides processing many hundreds of routine divorce, support, adoption and guardianship matters, our Family Law Unit regularly is engaged in bitter and time-consuming spouse-abuse cases and custody disputes.

Every day the Family Law Unit receives requests for information and assistance from various legal, social service and psychiatric personnel. An effort is made to respond to all such inquiries in a way that shows that The Legal Aid Society is responsive to the needs of the community it serves. Although not recorded in our statistics, hundreds of such calls a year are handled— another indication of the way our Unit tries to assist families in need.

In one case a wife was hospitalized because of beatings by her husband and the emotional stress caused by the beatings. Upon her return from the hospital, her husband refused to let her in the apartment and would not permit her to see their children. Our attorneys filed a petition in Family Court and visitation was immediately granted to our client, pending a final determination on custody. Shortly thereafter, the oldest child who is nine-years old appeared at her doorstep, covered with bruises. The woman called the police who found the younger children unattended and brought them to their mother's house. Upon a full hearing, which included psychiatric testimony, custody was awarded to our client.

In a bitterly-fought divorce action, custody and child support were awarded to our client who, with ex-husband, belonged to a storefront church led by a strong, dominating minister. The minister declared the wife "excommunicated" and urged the husband not to pay child support. Following repeated and extended court proceedings, all of which he lost, the father quit his job in the post office in an effort to avoid child-support obligations. By approaching the United States Office of Personnel Management, our attorneys succeeded in collecting from his vested

government pension the full $3,000 arrears in child support.

The Family Law Unit has been in the forefront of protecting the visitation rights of grandparents. One case involved a maternal grandfather and his five-year-old grand-daughter. Following the mother's death in a car accident, the child's father had terminated all communication with the mother's family, even though the family helped him to start a small business. When his wife was alive, he had forbidden her to visit or speak to her family but she secretly had remained in touch with them and they had come to love the child. Our client, although sensitive to the problems the child would encounter from her father if the court ordered visitation, nevertheless felt the child should have the love and comfort of her mother's family. Family Court agreed and ordered visitation.

Our Harlem office was successful in a heart-warming case in which a 19-year-old woman suffering from Down's Syndrome wanted plastic surgery which could correct certain deformities in her throat and possibly give her normal speech. Medicaid would pay for the operation, but not for the expensive initial consultation cost. Fortunately, our attorney discovered that the woman's father had left a small life insurance policy, took care of the guardianship papers and assisted the mother in obtaining the funds.

Attorneys in the Civil Appeals and Law Reform Unit have fought diligently to secure the rights of the poor. One of the major cases involves the many homeless families with children. The City often places these families in facilities which are filthy, violations-ridden firetraps. This photo details the conditions in these facilities.

Benefits

A combination of reduced federal funding and a more stringent application of federal law has resulted in many more clients coming to the Civil Division with severe problems in obtaining government benefits.

A welfare recipient who receives psychiatric treatment for severe depression sought to replace stolen household furniture, clothing and kitchen utensils for herself and her son (who is also under psychiatric care). The City and State Departments of Social Services denied her request for emergency assistance. The Administrative Law Unit went to court and successfully obtained these necessities to avert a serious psychiatric setback for the family.

One of our elderly clients receives her Social Security check by direct deposit in a bank account. DSS cut off her food stamps because her bank balance went above the food stamp limitation. The Unit succeeded in getting DSS to change its policy, because it is inappropriate to treat a direct deposit Social Security check as savings when it is known the money will be expended very quickly for necessities.

Our Harlem office assisted an elderly man who was denied old-age benefits because the government claimed the 1920 census indicated he was born in 1919 rather than 1911. The battle of the birthdate was waged for three years in federal court. Our efforts included research at the Schomberg Center for Research in Black Culture, and we proved there were twenty families with the same last name residing in Virginia in 1920, and that another individual had the same first name as our client. As a result of this activity, our client received over $15,000 in retroactive retirement benefits.

To our Bronx office came a 63-year-old man after losing a hearing for SSI disability. He spoke no English, had a fourth-grade education and had worked as a machine operator until he was no longer able to work due to a combination of back pain, headaches and depression. The hearing, including translation, had lasted only seventeen minutes. We persuaded the U.S. District Court that the record has not been sufficiently developed below; on remand, we established his disability and he received retroactive benefits from 1973.

The Brooklyn Office for the Aging demonstrated that one can make the bureaucracy move quickly on occasion. A 73-year-old widow in poor health, whose income consisted of a modest Social Security benefit, was dependent upon her food stamps to make ends meet. But the stamps were suddenly and improperly

discontinued. Just before the long Memorial Day weekend, she had spent her last dollar for medicine and was without food or money. At 3:30 p.m. on Friday our attorneys filed an Article 78 proceeding; the court directed issuance of emergency food stamps, but the DSS advised us it would be impossible to issue stamps prior to Tuesday. After intervention by the Commissioner himself, cash was issued instead and delivered to her Friday evening by us.

We won an unemployment insurance case in which the employer claimed he fired our client because business was bad; we established at a hearing that our client was fired in retaliation for making a Workers' Compensation claim. We litigated another employment case for over five years in federal and state courts; the Unemployment Insurance Board finally accepted our client's contention that he had called in sick on the day he was fired. In another situation, our client was fired while on jury duty because she allegedly failed to call in to her employer. We brought a successful tort action for wrongful discharge.

Training

This year the Civil Division had its largest group of new hires in recent years and conducted its most comprehensive new lawyer training program, combining supervised intake of cases with related lectures and demonstrations. This was made possible by a grant from the Vincent Astor Foundation. Training sessions were held on Civil Division and court procedures, common ethical concerns and overviews of the major substantive areas of practice. Mock trials and hearing demonstrations were held. Several case-review sessions were held in which the new lawyers presented and discussed with experienced staff the facts of a case, their analysis of the issues involved and their proposed strategy. Office supervisors assigned cases that were related to the formal training topics for that week. We continued to develop training materials and to add to our videocassette and audiocassette library.

We also continue to have separate monthly meetings of staff attorneys and paralegals in such areas as housing, family, administrative and consumer law. These meetings promote an exchange of practice information among staff and provide an important forum for developing strategies to deal with common issues and concerns. From those monthly meetings have come requests from staff for special training events which, this year, have included sessions in welfare law for housing advocates, public-housing training, foster-parent representation and interpretation of medical laboratory reports. When possible and appropriate, our training sessions have been open to volunteer attorneys and law students, as well as staff from other legal services programs.

In June, 1983, we received notice from the Astor Foundation that an expanded renewal grant for the Civil Division training unit had been approved for 1983 through 1985. This will enable us not only to continue the in-house training programs for new and experienced staff lawyers, developed during the initial grant period, but also to pursue new objectives utilizing computer technology.

During the past year, Julius Biervliet, a recipient of the Orison Marden Award, and for over twenty years a staff attorney at our Park Place office, retired. During his employment with The Legal Aid Society, he developed an international reputation for his expertise in immigration law.

Three attorneys have been promoted: Conrad Johnson, a staff attorney in our Harlem Office, became Attorney-in-Charge of that office, and Jeffrey Abrandt, a staff attorney in our Staten Island Office, became Attorney-in-Charge of our Brooklyn Office for the Aging, replacing Marshall Green, who became Director of Litigation for our Park Place trial office.

Despite the uncertainties facing the Legal Services Corporation, and legal services in general, we were fortunate enough to maintain our level of service for the poor throughout the year. Concerted efforts by our supporters will be needed if our future service delivery is to be assured.

Volunteer Division

The Volunteer Division plays a varied role in The Legal Aid Society's century old commitment to provide civil legal assistance to New York City's poor, elderly, and disabled. It represents thousands of the disadvantaged of the Harlem-East Harlem, Manhattan Valley, Washington Heights and Inwood communities, enlists hundreds of volunteer (*pro bono*) attorneys to take case assignments and serves as a model of an effective partnership with the private bar.

From its El Barrio East Harlem office at 230 East 106th Street, the Volunteer Division handled 1,500 cases this past year in a continuing effort to address clients' critical legal problems and preserve their housing stock and community services. The Division represented 200 tenant associations involving 4,600 families. Four hundred *pro bono* attorneys from private law firms participated on these cases as part of the Legal Aid family. This year the Division assigned 100 of these lawyers to the Society's Civil Division and federally-funded Community Action For Legal Services (CALS) offices throughout New York City to supplement their representation to the poor. Two hundred more pro bono attorneys were assigned to represent the Haitian 'boat people' seeking political asylum in the United States

David W. Weschler, Attorney-in-Charge of the Volunteer Division

Learning the Clients' Problems: The Neighborhood Office

The Volunteer Division seeks to accept only the most urgent and meritorious cases – where the client has been treated in a fundamentally unfair or unduly harsh way – because the demand for representation far exceeds capacity and those turned away generally go without counsel. Cases involve serious, multi-faceted problems: employment discharge and denial of unemployment benefits to a family breadwinner resulting in eviction proceedings for unpaid rent; school suspension and arrest of a youth leading to a Housing Authority "undesirability" charge to evict his parents; mistreatment and abandonment of a spouse raising grounds for divorce and questions of child custody, visitation and division of family property. Each problem deeply affects that family's life and requires the Division's staff and the *pro bono* attorneys to respond to the whole: represent the breadwinner before the Unemployment Insurance Board and in the eviction case, the youth before the school authorities and the parents at the "undesirability" hearing and the spouse in divorce proceedings after exploring a counselling alternative.

A few illustrative cases highlight the problems heard, the cases accepted and the role counsel plays to resolve them. Mrs. R. came to us a number of months ago when she was about to be evicted. Her divorced husband had continued to handle her financial matters but, without telling her, accumulated rent arrears and stipulated payment in a rent proceeding. He defaulted and Mrs. R. received a 72-Hour Notice of Eviction. We assigned Mrs. R. to Elizabeth Aivars-MacGregor of Vassilou Associates, a volunteer attorney trained in our housing training program funded by The New York Community Trust. Mrs. Aivars-MacGregor moved to vacate the judgment and impending eviction warrant and to allow Mrs. R. to intervene. The court added Mrs. R. as a party and granted her time to pay the back rent and continue in occupancy during the period. Mrs. R. paid, entered into a new lease relationship and is currently rearing her child in *her* apartment.

Mrs. M. sought assistance in obtaining proceeds of a small insurance policy on the life of her son who

Division. CLO and the Volunteer Division have represented more than 28,000 clients in this manner and have become the principal means of *pro bono* legal assistance in New York City and a national model of private sector partnership serving the legal needs of the poor.

The participating firms play an indispensable role not only by encouraging their attorneys to accept these no-fee cases (which require court appearances and preparation during business hours), but by extending the firm's secretarial, photo copying messenger, library and other support services to each case. A number of firms deserve special mention for this significant support to The Legal Aid Society in the highest tradition of the profession. They include: Barrett, Smith, Schapiro, Simon & Armstrong; Berle, Butzel, Kass & Case; Cahill, Gordon & Reindel; Carter, Ledyard & Milburn; Chadbourne, Parke, Whiteside & Wolff; Davis, Polk & Wardwell; Debevoise & Plimpton; Dewey, Ballantine, Bushby, Palmer & Wood; Donovan Leisure Newton & Irvine; Hughes Hubbard & Reed; Kaye, Scholer, Fierman, Hays & Handler; Kelley Drye & Warren; Kramer, Levin, Nessen, Kamin & Frankel; London & Buttenwieser; Lord Day & Lord; Milbank, Tweed, Hadley & McCloy; Paul, Weiss, Rifkind, Wharton & Garrison; Proskauer, Rose, Goetz & Mendelsohn; Shea & Gould; Shearman & Sterling; Simpson, Thacher & Bartlett; Skadden, Arps, Slate, Meagher & Flom; Sullivan & Cromwell; White & Case; Willkie, Farr & Gallagher; and Winthrop, Stimson, Putnam & Roberts.

A number of corporate law departments also have contributed to the work of the Volunteer Division during this year. The most significant of which are Mutual of New York, Western Electric and Arthur Young & Company.

The past year was a watershed in the expansion of *pro bono* participation as the Division assigned an initial 100 volunteer attorneys to 15 offices of the Civil Division and CALS, which together with the Volunteer Division, provide virtually all neighborhood legal assistance to the poor in New York City. These assignments represented the first attempt to augment throughout New York City on a systematic basis the kinds of individual case assistance by *pro bono* attorneys available to CLO's upper Manhattan communities for the past 15 years. Grants from the Ford Foundation, The New York Community Trust, Taconic and Scherman Foundations made this expansion possible. The effort also was strongly supported by the New York County Lawyers' Association, which solicited its full membership to take case assignments. Paula Williams, Volunteer Division Assistant Attorney-in-Charge, coordinated this expansion jointly with Randye Retkin of the Legal Services Support Project. They assumed a difficult assignment which required conferring with each neighborhood office to assess the kinds of cases where volunteers were most needed, devising operating procedures, scheduling timely case assignments and monitoring the whole process. The design and implementation of this administrative system and assignment of the first 100 attorneys from 26 participating law firms represent an impressive beginning.

Improving Housing and Community Services

Housing is inevitably one of the most pervasive problems of poor communities. Much of the residential housing stock is old and deteriorated and the low income residents generate an inadequate rental base to stimulate new private construction and rehabilitation. As abandonments occur, families are compelled to move from their neighborhoods and leading retail and social services pull out in an accelerating pattern of neighborhood decline.

A Participating Attorney from one of the major New York City law firms interviews a client at the Volunteer Division office. Approximately 400 attorneys volunteer their time to help the needy.

CLO established a Housing Development Unit in 1979 with a grant from New York City's Housing Preservation and Development Administration to help reverse this cycle. During the past four years, the Unit's four staff attorneys and five paralegals have

teamed with 120 participating lawyers to represent the tenant associations of 380 buildings. Their efforts have been largely successful. Services have been improved and vacant apartments repaired and rented.

A typical situation involves the 15 families at 507 West 140th Street who came to our office last October after the landlord explicitly left them on their own. Tenants frequently seek legal help at the outset of winter when they are facing imminent abandonment and loss of heat, hot water, elevator and other services. The landlord had stopped paying for any services and written off the old building as economically unviable. Instead of having to vacate 507 West 140th Street, Douglas Simmons, staff attorney, and Michael Levinson, a Simpson, Thacher participating attorney implemented an HDU program of tenant management, which resulted in 100 percent rent collection and effective maintenance of essential services. Counsel are now working with the Community Service Society's Ownership Transfer Program on a plan to acquire and co-op the building. The low-income tenants have little acquisition funds but counsel will form them into a non-profit development company. This should offer the owner a considerable tax benefit consideration through sale to the non-profit entity.

Another principal strategy in situations of owner abandonment is to institute a special proceeding to secure court appointment of a tenant administrator empowered to collect rents, restore services, make repairs and rent vacant apartments. The Unit has secured appointment of 80 administrators through such proceedings handled by teams of staff and participating attorneys. Managing any building, especially an old neglected one, is a difficult job and the Unit's paralegals and attorneys provide ongoing training on strengthening the tenant association and on bookkeeping, preparation of court-required accountings, leasing of apartments, selection of contractors and other management responsibilities.

Tenants assume management under many different circumstances. The building at 200 West 111th Street is the home of 48 low-income families including a large number of senior citizens. In the 1960's, the owner received a low-interest loan from the Federal Department of Housing and Urban Development (HUD) which rehabilitated the building and created decent affordable housing. However, that goal became subverted as the property suffered from extremely poor management and eventual landlord default of its mortgage. Facing foreclosure the owner obtained HUD approval of a 75 percent rent increase, which covered past delinquencies but threatened the tenants' ability to remain in their homes. CLO assigned the case to Michael Wiles, a participating attorney from Debevoise & Plimpton. Mr. Wiles and clients reviewed with HUD officials the management inadequacies suffered during the past 15 years and the present inequity and hardship of imposing the approved rent increase. HUD agreed, the increase was rescinded and the tenants have assumed management and are negotiating with HUD for repairs and subsidies with a view towards purchase as a low-income cooperative.

Tenant management and low-income tenant cooperatives are most significant housing concepts in poor communities and encourage tenants to improve their buildings and take greater roles in stabilizing their neighborhoods. New York City, which owns many tenements upon tax foreclosure of abandoning owners, has established an innovative program to sell these buildings to the tenants, but faces uncertain future sales due primarily to reductions in supporting federal programs. Attorneys in our Housing Development Unit have guided seven buildings through title closure and cooperative conversion after long representation prior to sale. This year the Unit has combined its tenant management and co-op efforts into a broader rehabilitation plan that includes low-cost restoration of vacant city-owned buildings through homesteading and sweat equity. A consultant-developer has joined the unit to refine and implement this plan. The Unit seeks a future that builds upon present efforts to reclaim the housing stock in low-income neighborhoods.

Representing Community Organizations

Representation of non-profit community organizations is another of the Volunteer Division's valuable legal services. The Division represented some 40 community groups this past year which drew upon the participating law firms' corporate, tax and commercial law expertise. Most groups seek assistance with the formative activities of obtaining their corporate charters, drafting by-laws and securing tax exempt recognition from the Internal Revenue Service. These often are requisites to government or foundation support. The charter and chartering process add organizational impetus to the group, and the by-laws provide election, quorum and voting procedures to handle significant issues and internal checks and balances concerning bank accounts.

Counsel also becomes involved in lease negotiations and review of contracts with vendors and frequently resolves emergencies that threaten the group's existence. In one such case involving a senior citizen

and youth vocational training program, Con Edison improperly removed the gas and electric meters which disrupted the training program and lead to termination of the training grant by the City. After threatened litigation against Con Edison restored the utilities, Simpson, Thacher Attorney David Massingill then challenged the defunding in State Supreme Court, which mandated a new hearing before the City agency. Mr. Massingill obtained the reinstatement of the grant.

Criminal Proceedings

The Volunteer Division also is called upon to represent residents accused in criminal proceedings. Residents seek not only court representation but the aid of counsel at the time of arrest to seal records and to receive information on the cases of family members. *Pro bono* representation is supervised by a Volunteer Division attorney in conjunction with the Society's Criminal Defense Division.

Stretching Legal Resources

Most legal services programs no longer take divorce cases due to federal funding cut-backs. Forty volunteer paralegals and lay persons form the staff of the Volunteer Division's Uncontested Divorce Unit in order to continue this important area of service.

The Division's recently revised Divorce Manual provides the text for training the volunteers, who come to the office during evening hours to conduct client interviews and draft the necessary legal documents. For the past five years, the New York Junior League has been a mainstay of the Unit and generously underwrote the publication cost of the manual. Paralegals from Milbank, Tweed, Hadley & McCloy also have contributed significantly.

Volunteer paralegals have been assigned administrative welfare fair hearing cases working in close conjunction with the Division's attorney and paralegal specialists. The excellence of the Sullivan & Cromwell paralegal program over the past three years deserves special mention.

The Housing Advice Clinic is another resource-stretching approach to assist individual families with housing problems. Three afternoons each week low-income residents meet with an attorney/paralegal team for a 30-minute case consultation on questions concerning leases, apartment repairs and other housing matters. The most critical of these problems, such as the case of Mrs. R., become the housing intake. Where a persistent lack of essential services affects all of the tenants in the building (e.g. no heat and hot water) the tenant may be referred to a neighborhood housing organization to meet with the tenants and consider the formation of a tenant association.

Community legal education is essential since so few attorneys are available to handle the legal problems of low income residents. The Housing Development Unit worked with students at the New York University Film School this year to complete a videotape of tenant meetings and other client activities that offers information ranging from emergency self-help measures to restore heat to opportunities for cooperative conversion. The videotape provides a valuable introduction to housing law for tenant association, community groups and new participating attorneys. Volunteer Division staff also share their legal knowledge with the community through articles in community newspapers, as moderators and panelists in numerous community workshops and forums, on Spanish language call-in radio programs and as members of various community coalitions, human services consortiums and the Area Policy Boards.

In addition, the Division has been called upon to help train legal services programs throughout the country to organize their *pro bono* components. All federally-funded legal services programs (such as CALS) now are mandated to use 10 percent of their federal money to involve the private bar in delivering services. The Volunteer Division's model of a neighborhood-based core staff complemented by a larger number of *pro bono* attorneys, paralegals and lay volunteers is a recognized, cost-efficient and service-effective means to comply with the federal mandate and to, most importantly, increase legal resources assisting low income persons.

Volunteer Division Office at 230 East 106th Street.

Criminal Defense Division

In fiscal 1983, the Criminal Defense Division was assigned 150,093 cases in the Criminal and Supreme Courts in New York City, despite a ten-week period in which new assignments were declined. The Division disposed of 137,351 cases in the New York City Criminal Court and 12,360 cases in the Supreme Court.

The Division's staff tried 847 cases with 795 resulting in a verdict. Jury trials accounted for 57 percent of the trials conducted by staff in the Criminal Court and 91 percent of trials conducted by staff in the Supreme Court. The acquittal rate in Criminal and Supreme Courts was 47 percent.

In fiscal 1983, an average staff attorney was assigned 402 cases and disposed of 400 cases during the year. Each attorney carried an average caseload of 53 cases of which 23 percent were felonies.

In fiscal 1983, three New York State grant programs were merged into the Target Crime Initiative Program, which is intended to focus on "major and violent offenses and repeat offenders." TCI consolidates Division funding and representation that were formerly provided under the State Felony Program, the Major Violent Offense Trial Program and the Major Offense Prosecution Program.

County Trial Offices

New York County

A CDD attorney represented a 65-year-old grandmother charged with criminal possession of a weapon after she displayed the .32 caliber pistol to scare off a group of eight youths who had encircled her outside

Caesar D. Cirigliano, Attorney-in-Charge of the Criminal Defense Division (center) with members of his senior staff and a new class of attorneys.

the Port Authority bus terminal. The grand jury refused to indict the woman who was on a visit from Alabama to see her grandchildren. Two members of the group that precipitated the action were each charged with criminal possession of a weapon because a police search revealed knives in their possession.

In People v. Walker, Justice Shea applied CPL 30.30, the speedy trial rule, to a defendant charged with second degree attempted murder and dismissed the charges. The statute requiring prosecutor readiness for trial within six months after commencement of a criminal action, exempts murder and manslaughter but is silent regarding attempted murder. Our staff attorney, representing James Walker, filed the speedy trial motion arguing that since an indictment was not filed until more than six months after the commencement of the criminal action, the People were not ready for trial within the six-month statutory period. The court agreed with defense counsel's position that attempted murder is not a species of murder, in the second degree, an exempted crime, but is a separate crime subject to the statute. The court contrasted charges noting that "Because the dead victim is often the only eyewitness, a murder case usually requires complex testimony by civilians and by medical and technical experts to establish the accused's connection with the crime. In a homicide case, the prosecutor's preparation time is likely to exceed six months."

The Criminal Defense Division's New York County office staff appeared on the cover of *New York Magazine*, which featured an article on the Society with special emphasis on the work of the Division.

Bronx County

Most innocent clients accused of a crime feel only relief when their cases are successfully terminated and there is very little elation, merely a sense of an end to their mental anguish.

In Bronx County, a teacher's aide was accused of sodomizing three male students. The media publicized the arrest and the school's Parents Association demonstrated, demanding that our client be fired. The school suspended him and the court set high bail.

Fortunately for this client, teachers, colleagues and his lawyer believed in him. After thorough investigation, witnesses were located and staff attorney Tom Benigno obtained his release on bail.

Subsequently, two of the three boys told their priest that the accusation was false and was made at the instigation of the third boy's mother. Although the charges regarding those two boys were dismissed, the District Attorney's office insisted on vigorously prosecuting the case concerning the third boy.

Mr. Benigno convinced the presiding judge to dismiss the remaining counts of the original indictment with leave for the District Attorney to represent the case to the Grand Jury. The District Attorney's office represented the case and defense counsel located and persuaded witnesses as well as the defendant to testify before the Grand Jury. The Grand Jury after listening to testimony for two days voted not to indict our client.

The teacher's aide, together with teachers and colleagues, gave a surprise party and presented Tom Benigno and the Bronx County office with a plaque inscribed:

Presented to

THOMAS BENIGNO AND
THE LEGAL AID SOCIETY

IN APPRECIATION OF YOUR
UNSELFISH EFFORTS TO PROTECT
THE RIGHTS OF THOSE WHO ARE
UNABLE TO AFFORD THEIR
OWN ATTORNEY

Thomas Benigno with plaque he received from a grateful client.

On August 16, 1982, the Appellate Division, Second Department, reversed a conviction after trial, in *People v. Charles Daniels* and remanded the case to Queens County for a new trial. The defendant had

been convicted of attempted murder and sodomy in the First Degree. This was a classic case of misidentification involving a single eyewitness, 10 years of age. The defendant denied his guilt vehemently at all times and in his testimony at trial. He had never been arrested prior to this incident, was 35 years old and was gainfully employed. The prosecution witness claimed he observed the defendant sodomize a two-year-old child and then throw the child off a roof. When the case was reversed and assigned to the Criminal Defense Division, Queens County, for retrial, the defendant had already served almost four years in confinement.

The case was assigned to one of our supervising attorneys, Larry Halfond and he, with the assistance of investigators, Ettore Perrazzo and John Dolan, began an intensive investigation of the facts and circumstances surrounding the arrest of Charles Daniels. Convinced of Mr. Daniels' innocence, they began to uncover witnesses and facts which were unknown at Mr. Daniels' first trial. Included in their work was a complete investigation concerning the background and personality of the sole eyewitness, the 10-year-old boy. It was discovered that he had severe psychological problems which rendered his testimony highly unreliable. In fact, the accumulated evidence indicated that this young boy had himself committed the attack on the two-year-old child and that the child had *never* been thrown off the roof. Medical evidence was available to show that the absence of injuries consistent with such a fall from a four-story building would indicate that it never occurred. Additionally, the eyewitness' psychological problems indicated that he was capable of sexually assaultive acts. Other witnesses placed the 10-year-old at the scene of the crime, allegedly after the child was thrown from the roof.

As a result of these thorough and systematic efforts, the Division secured a dismissal in the interest of justice, of all charges against Charles Daniels, with the consent of the District Attorney, Queens County. Queens County.

The Criminal Defense Division in Queens County has developed and implemented a system of case tracking for all its staff attorneys to insure that each attorney has his or her cases, both in Criminal Court and Supreme Court, tracked into previously designated courtrooms. As a result, each attorney is able to more effectively represent individual clients because his or her cases are tracked into two Criminal Court Parts and one Supreme Court Complex Part, rather that being assigned randomly, with concomitant logistical problems.

Ivar Goldart, Assistant Attorney-in-Charge of Legal Affairs in the Criminal Defense Division (center) who successfully argued *Morganthau v. Altman* in the Court of Appeals is shown with Janice Taylor and Michael Alperstein, who worked on the case.

Court of Appeals Precedent

In The Matter of Robert M. Morganthau, District Attorney of New York County v. Benjamin Altman, A Justice of The Supreme Court, the Assistant Attorney-in-Charge of Legal Affairs argued successfully that ... "the order in which witnesses are presented before the grand jury is a matter of proceeding within the supervisory jurisdiction of the court, who, together with the District Attorney, is a 'legal advisor' of the grand jury." The Special Litigation Unit had joined in defense of Justice Altman's order which the Court of Appeals upheld.

In March, 1982, Vincent Futia and his lawyer, Garvin Smith, appeared in the Grand jury anteroom pursuant to the accused's request to testify. Upon being invited to bring his client into the grand jury room Mr. Smith inquired of the Assistant District Attorney as to whether he had presented the prosecution's case to the grand jury. The assistant had not. Mr. Smith refused to put his client in the awkward position of explaining his side of an event about which the grand jury had no knowledge. It was agreed to seek guidance from the supervising justice of the grand jury.

Mr. Smith, with the assistance of Law Advisory Bureau Director Michael Alperstein and staff member Janice Taylor secured an order from Justice Altman which directed the prosecution not to condition a

defendant's right to testify on his agreeing to be the first witness in a grand jury proceeding convened to indict him.

Several months later the New York County District Attorney claiming absolute power concerning the order of witnesses in the grand jury unsuccessfully challenged Justice Altman's authority to issue his ruling. Subsequently the matter was argued successfully by Ivar Goldart in the Court of Appeals.

As a result the case was never presented to a grand jury. Mr. Futia pleaded guilty to a petty offense and received a conditional discharge. The District Attorney's practice of inverting the customary order of proof has been terminated.

Investigation

In fiscal 1983, the Criminal Defense Division's corps of seasoned investigators were assigned 6,348 cases. The staff completed a total of 13,343 assignments including reinvestigations, up 6.5 percent from the prior fiscal year. Over 55 percent of the Division's investigative assignments are completed while cases are pending in the Criminal Court, allowing staff attorneys to evaluate the strength of the prosecution's case and to make a determination of fairness of plea offers and the advisability of clients appearing before a grand jury.

The Technical Services Unit completed 989 assignments during the fiscal year. The Technical staff provided assistance in 62 arson analysis, 58 ballistics evaluation, 34 fingerprints analysis, 101 crime scene cartographic renditions, 516 polygraph examinations and 216 crime scene photographic assignments. The Technical Services Unit has added a Laboratory Unit. The Unit provides expertise in analysis of blood, semen, drugs and alcohol including examinations conducted in DWI cases using a Breathalyzer or Drunkometer.

Special Litigation Unit

This small, talented group of attorneys seeks to enforce the rights of the Division's clients through affirmative litigation and class action suits, thereby asserting and protecting the legal interests of defendants more broadly than is feasible on a case by case approach.

In *People v. Felix*, the Court of Appeals affirmed Appellant's conviction in this constitutional challenge to PL§ 70.02(5) which premises a harsher sentence on the basis of an unsustained charge. Appellant's jurisdictional statement is pending before the U.S. Supreme Court.

In *Angerville v. Ward*, the Unit filed a class action in the United States District Court for the Eastern District of New York. Plaintiffs, who are pretrial detainees in Queens County, claimed they were denied their constitutional rights of access to the assistance of counsel and to the courts because of the absence of facilities in the courthouses of Queens County for private consultation with counsel prior to or during the recess of scheduled court appearances during the period of their pretrial detention. Pursuant to the decision of Judge Platt, attorney/client interview booths will soon be constructed in the Queens County Courthouses.

In the *Matter of Legal Aid Society v. Rothwax*, the Appellate Division, First Department, granted an Article 78 petition, affirming the right of an attorney to be safe in his person and the right of a defendant to a workable attorney/client relationship. The Appellate Division held that the trial court had abused its authority when it refused to relieve an attorney who had been struck by his client.

In *People v. Rivera and People v. Behar*: the Unit was successful in vacating the penalty assessment imposed upon our clients. Unfortunately, in neither case did the court reach the constitutional challenge to the penalty assessment itself, deciding instead on more narrow grounds.

Training Unit

Staff training continues to be a major priority of the Criminal Defense Division. A Staff Development Committee was established within the Division with representation from staff, trial office supervisors and central management. The Committee's initial focus centered on staff attorney training and development within the first six months after completion of the Basic Training Program. Many of the Committee's recommendations have been incorporated into the Society-ALAA Joint Committee's proposals.

The Training Unit conducted the Basic Attorney Training Program for new staff in September – October, January – February and April-May. Faculty participating included trial office supervisors, the Chief Investigator, the Assistant Attorney-in-Charge, Legal Affairs and members of the Special Litigation Unit and the Law Advisory Bureau.

All of the Division's training manuals were updated and a new Motion Workshop was developed for inclusion in the program. Staff attorneys prepare actual pretrial motions which are critiqued in the workshop.

The Director of Training has several other responsibilities including coordinating the Division's

Donald O. Weinberger, Assistant Attorney-in-Charge of Operations for the Criminal Defense Division (left) and Michael A. Cooper, Society President, congratulate Mrs. Robert Kaplan and her sons, Brian and David, during the reception following the Annual Meeting. Bob Kaplan, a supervising attorney in the Division who died in April, 1982, received the Orison S. Marden Award posthumously for his dedicated service and devotion to the Society.

Legislative Review Program and participating in the Recruitment and Selection Program.

During the year, the Director represented the Division in a Fund for Modern Courts Program at John Jay College and before a group of Chinese law scholars visiting under the auspices of the National Committee on United States-China Relations.

Spanish language training was conducted for 51 attorneys in intermediate and advanced fluency classifications in the fall and winter. An additional 69 attorneys, who were classified as beginners received training in the Spring.

Spanish Interpreter Services

The Criminal Defense Division's interpreter/trainers provide verbatim and simultaneous interpretation for staff attorneys. New staff attorneys are acquainted with the availability of this service through the use of skilled interpreters during the Basic Attorney Training Program.

The interpreter staff responds to more than 200 requests each month from trial staff as well as other Society attorneys. The Parole Revocation Defense Unit of the Criminal Appeals Bureau frequently requests these skilled interpreters for revocation hearings.

Law Advisory Bureau

The Law Advisory Bureau has completed its first decade of service to Criminal Defense Division attorneys. Bureau attorneys provide attorney to attorney advice and research assistance. The Law Advisory Bureau tracks and analyzes decisions that supercede or revise prior precedents and legislation that impacts upon the Criminal Defense Division's practice. Additionally, the Bureau responds to questions regarding court administrative actions and district attorneys' policies and procedures that affect Division clients. For example, Bureau staff participated in contesting the New York County District Attorney's reordering of the presentation of witnesses to a grand jury, securing an order barring that practice.

The Law Advisory Bureau works closely with the Training Unit both in the conduct of the Division's Legislative Review Program and the preparation of and conduct of training. Staff also works closely with the Special Litigation Committee and the Training Unit, analyzing and preparing for staff, periodic law bulletins, which are cross referenced to the Bureau's Criminal Law Index. Initial steps are being taken to explore the application of micrographics or other technology to the manually maintained index system.

Special Defender Services

The Criminal Defense Division employs social workers and field counselors to assist staff attorneys with bail applications, motions to dismiss charges in the interests of justice, plea and sentence negotiations and the conduct of sentence argument. This staff prepares and analyzes the social histories of clients and plans, locates, recommends and implements program placements for clients. Specialized assistance in locating job training or employment programs is provided by the Unit's job developer.

The program concentrates on difficult cases, especially where a sentence of imprisonment is mandated. The program's efforts often result in a less severe term of incarceration where a non-incarcerative disposition cannot be achieved. Written presentence memoranda are included in a sentenced client's file and are utilized in the Parole Board's release decisions.

Special Defender Service staff received more than 1,200 referrals from staff lawyers during the past year. Of those cases, most of which involved serious felonies, 860 were referred primarily for assistance in the areas of sentencing and plea bargaining. SDS social workers prepared more than 400 presentence memoranda during the past year. In 150 other cases, prepleading memoranda were prepared in support of the attorneys' efforts to win the best possible pleas for our clients. Ten percent of the "regular" referrals involved juvenile offenders. Affidavits in support of removal motions were filed in more that 50 percent of these JO cases and SDS social workers also testified at removal hearings in a significant number of these cases. Almost 350 clients were referred for emergency services, including housing, drug or alcohol treatment, psychiatric services or job placement. In addition, the job developer successfully placed almost 100 clients in jobs or vocational training programs during the past year.

Adam W. was a 17-year-old with a troubled family history when he was referred to our New York County office with three pending felony indictments, all for robbery. A comprehensive investigation revealed that highly inadequate homelife was undermining an otherwise positive client potential. Following submission of a prepleading report, our social worker teamed up with a member of the Probation Department's Intensive Supervision Program and found an appropriate therapeutic residence for Adam in upstate New York. Then, through skillful advocacy, the social worker convinced both the judge and assistant district attorney to postpone sentencing pending progress reports on Adam's adjustment in placement. This matter was adjourned repeatedly to monitor his progress, with the social worker in constant communication with the program as well as making periodic visits to counsel her client. Finally, after many months of positive adjustment, Adam W. was sentenced to probation.

Frances E. was a seriously disturbed 40-year-old woman referred to our Bronx County office following a guilty plea to an assault for which state law mandated incarceration. After obtaining various psychiatric records and conferring with family members, including the victim of the crime, an extensive presentence memorandum was submitted, arguing how inappropriate and counterproductive incarceration would be in this matter. Armed with this memorandum, defense counsel was able to convince both Court and the district attorney's office to reconsider the original plea so that incarceration would not be mandatory. A Bronx field counselor then guided this woman through various intake procedures until she was placed in a day hospital treatment center. As a result of these efforts, Frances E. is now receiving needed care rather than being imprisoned.

Post Conviction Service Unit

This attorney-paraprofessional staff provides representation for sentenced inmates concerning a broad range of problems, including sentence computation, disciplinary proceedings, conditional release and warrants. Most requests for assistance involve questions of jail time allowances and the Unit has had marked success in obtaining corrected jail time credit on behalf of its clients. A second major area of activity involves sentence computation. This generally involves correcting errors made by officials in calculating the effect of multiple sentences.

In fiscal 1983, restoration of "good time" and recomputation of sentences saved our clients 3,000 days in jail and the City of New York $225,000 in custodial costs. Removal to state facilities also benefits our clients, enabling them to receive the limited rehabilitative services available in those institutions; services that are not provided to those in a transitory state.

The staff also assisted clients with the disposition of outstanding warrants and advised them on appeal rights and in obtaining parole. The Unit handled 1,762 cases during the fiscal year.

Prison Legal Assistants Program

Prison Legal Assistants are paraprofessionals who work out of the Department of Correction's pretrial detention centers and serve as liaisons between staff attorneys and clients and assist clients in resolving institutional problems resulting from pretrial detention. Staff provided services to 6,871 clients during the year.

Stanley M. was arrested in 1975 on a charge of escape in the first degree. It was alleged that he had escaped from the Bronx House of Detention while serving a nine-month sentence for a criminal trespass conviction. His prior criminal history included a felony conviction within the past 10 years mandating incarceration if convicted on the current charge. Stanley M. was indicted and subsequently paroled. In 1976, he was injured in a fall which resulted in permanent paralysis. Thereafter, Stanley M. was sent to the Coler Memorial Hospital for longterm rehabilitation and was confined to a wheelchair because of his disability. In 1978, the Criminal Defense Division brought on a motion to dismiss in the interest of justice. In dismissing the indictment Justice Goldfluss stated, "a higher authority than this court has decided the fate of this defendant."

Stanley M. was confined continuously at Coler Memorial Hospital until 1980 when he was informed that he was ready for discharge to a community residence with housekeeping assistance and outpatient medical care. However, State Parole officers were seeking Stanley M. on an arrest warrant for his prior unauthorized leave from a work furlough program while serving a state sentence. He surrendered voluntarily to the Division of Parole and was remanded to the prison ward at Bellevue Hospital. The Prison Legal Assistants Program, upon Stanley M.'s request, prepared a petition to the Commissioner of Correctional Services regarding Stanley's condition and special medical requirements. The petition was granted and Stanley was placed in a Medical Leave of Absence Program. However, Stanley M. was returned to state custody in 1980 for failing to report promptly to the Edgecombe Correctional Facility upon his release from Bellevue Hospital.

Stanley M. was confined and denied parole release twice and suffered physical deterioration because of a lack of necessary medical care. In 1982, the Prison Legal Assistants Program's petition to the Board of Parole for case review which included documentation of Stanley M's physical condition, plans for medical and vocational rehabilitation, and recommendations from the staff at Queensboro Correctional Facility, resulted in his release on parole.

Mental Hygiene Unit

The Criminal Defense Division in each county trial office utilizes a staff attorney who has recognized expertise in mental health law. These staff attorneys provide our clients with representation at competency hearings and advise and assist trial attorneys in preparing and presenting defenses that involve mental health issues. These attorneys also have responsibility for continuing representation of clients with outstanding charges who have been committeed to the Office of Mental Health as incompetent to stand trial. The attorneys assist at commitment hearings following a "not responsible" verdict or plea.

The Mental Hygiene Unit was assigned to 1,120 cases; 819 were in the New York Criminal Court and 301 in the Supreme Court. Bellevue, Kings County and Elmhurst Hospitals, the City's mental hospitals, referred an additional 412 cases of which 152 resulted in a hearing. Staff provided counseling and representation for more than 90 clients residing at the Mid-Hudson Psychiatric Institute.

Recruitment

The Criminal Defense Division broadened its recruitment efforts during the year. Spearheaded by the Assistant Attorney-in-Charge, Operations, trial supervisors and central management participated in public service recruitment consortium programs in Washington, D.C., Philadelphia and Boston. Division interviewers met with law school placement staff to provide a detailed explanation of our staffing needs and information regarding the Society. Moreover, interviews were conducted with more than 100 law students from 15 law schools. A similar outreach program will be conducted in the fall.

Court Administration

The "lobster shift," a new 1 a.m. to 9 a.m. arraignment session, has been added in New York County. The institution of the "lobster shift" by court administrators represents another attempt to cope with excessive delay in the arrest to arraignment time cycle in New York County. New York is the only major county where the district attorney complaint room does not operate around the clock. Despite virtually continuous arraignment, delay persists.

Federal Defender Services Unit

The Federal Defender Services Unit, which serves the United States District Courts for the Southern and Eastern Districts of New York as well as the Second Circuit Court of Appeals, was assigned as counsel in 1,879 matters during fiscal 1983. In the district court offices, 1,784 cases were handled, including 55 criminal trials. The 12 attorneys in the district courts offices represented defendants in a variety of criminal matters, including cases involving allegations of international drug smuggling, commodities and tax fraud, extortion, political corruption, and the unlawful export of high technology equipment. Representation was also provided in probation and parole revocation hearings, *habeas corpus* actions, extradition proceedings and hearings conducted pursuant to the Prisoner Transfer Treaty in force between the United States and Canada.

Criminal Appeals Bureau

The Criminal Appeals Bureau completed 915 appeals in fiscal year 1983 and obtained reversals or modifications in 112 cases.

The Bureau argued 46 cases in the New York Court of Appeals, winning 12. A number of those cases were of significance to the criminal justice system.

In *People v. Fuller*, the court held that a sentencing court is not free to delegate to the Probation Department the power to fix the conditions of restitution.

In *People v. Parker*, the court held that an incriminating statement made by the defendant to his parole officer was inadmissible at trial where the parole officer failed to inform the defendant of his constitutional rights and where the defendant was represented by counsel on his criminal charges.

In *People v. Hutchinson*, the court held that the failure of a police officer to include in his reading to the defendant of his *Miranda* rights, the right to have the assistance of counsel during questioning, rendered the confession obtained thereafter inadmissible at trial.

In *People v. Colon*, the court, in construing the speedy trial provisions of the Criminal Procedure Law, held that the prosecution cannot claim they fall within the statue's "ready for trial" rule when they have not converted a complaint into information and consequently, a defendant's failure to appear in court on the return date of a desk appearance ticket does not excuse the prosecution's lack of readiness.

In *People v. Trinidad*, the court held that the prosecutor exceeded the bounds of proper summation when he argued that the victim would have been "suicidal or foolish" to misidentify the defendant.

In *People v. Cecil Z.*, the court held that although he pled guilty to separate crimes on the same day, the defendant was still eligible for youthful offender treatment notwithstanding statutory prohibitions against the granting of youthful offender consideration to one who has previously been adjudicated a youthful offender.

Federal Defender Services Unit

Attorneys from the Bureau's Federal Defender Services Unit also won important victories before the Second Circuit.

In *United States v. Hansen*, the court held that a judge may not, when imposing sentence, penalize a defendant for conduct that may have been the result of mental illness. Thus, it vacated a sentence that may have been based on the defendant's role in his friend's suicide but without consideration by the sentencing judge of the defendant's mental condition.

In *United States v. Gelb*, the court construed a provision of the Explosive Control Act, which makes it a federal crime to maliciously damage a business premises by means of an "explosive." The court held that while the statutory term "explosive" includes incendiary devices such as Molotov cocktails, it does not include a fire set by the use of uncontained gasoline. The court based its ruling on the fact that the statute was envisaged by Congress as anti-bombing, not anti-arson legislation.

In *Daye v. Attorney General*, an *en banc* court, in establishing criteria for the exhaustion of state remedies in federal *habeas corpus* proceedings, held that a federal constitutionally-based claim had been adequately presented to the state courts when the defendant claimed, on appeal to the state courts, that he had been denied a "fair trial" on the grounds of judicial bias and misconduct.

Prisoners' Rights Project

In its 13th year of existence, the Bureau's Prisoners' Rights Project successfully continued its efforts towards securing humane, constitutional conditions of confinement in the New York City jails and New York State prisons. The Project represented thousands of pre-trial detainees and sentenced prisoners in complex federal class action litigation and assisted these inmates, through administrative channels as well, with a myriad of problems related to their incarceration.

For the past year, Project attorneys have been working with an independent monitoring consultant in an effort to assure compliance by New York City with the terms of comprehensive consent judgments governing such conditions in the City jails as environment, health, food service and access to legal research materials. This rather unique compliance and enforcement mechanism, that was created by agreement of the parties and has not required the ongoing, direct involvement of the court, has yielded favorable results.

The ever-increasing detention population in the City jails led to a motion by the City to be relieved of orders, previously secured by Project attorneys, that set limits on the populations of the House of Detention for Men and dormitories in an adjacent facility. Following a lengthy hearing this past spring, Project attorneys succeeded in defeating the City's motion. Federal Judge Morris E. Lasker's opinion, in *Benjamin v. Malcolm* had significant implications for lawyers involved in jail conditions litigation throughout the country, as well as for our clients, in three respects: (1) it refused to sanction inhumane overcrowding and to distinguish recent Supreme Court decisions, relied upon by defendants, that appear to endorse a less vigilant attitude by the courts with respect to the serious consequences of prison overcrowding; (2) it reaffirmed the heavy burden that defendants bear in seeking to modify court orders aimed at eliminating unconstitutional conditions; and (3) it confirmed that there are numerous measures available to reduce jail overcrowding that would not have a negative impact on community safety and would be less costly to taxpayers.

Several new suits on behalf of inmates in City facilities also were filed by Project attorneys.

Vega v. Ward is a class action on behalf of all sentenced and pre-trial inmates held in Rikers Island Hospital. The case challenges as unconstitutional a variety of conditions, including the dilapidated structure of the building, unsanitary conditions, fire safety violations and inadequate medical care.

The Rikers Island Correctional Institution for Men, a facility housing approximately 2,300 sentenced misdemeanants, became the subject of litigation in *Fisher v. Ward*. Among the conditions being challenged are severe overcrowding, an unsanitary, dilapidated physical environment, excessive use of force by correction officers and inadequate medical services. Shortly after the case was brought, overcrowding in the facility was reduced substantially.

In a suit brought on behalf of an individual pre-trial detainee, *Samuels v. Department of Correction*, the Project successfully represented, on appeal to the Second Circuit, a *pro se* litigant whose complaint had been dismissed by the district court. The Circuit held that the complaint, which alleged that the Department of Correction had wrongly refused to allow the inmate to attend the funeral of his children, stated a claim for contempt of a court order secured previously by the Project.

This past year saw the successful resolution of a number of cases involving the State correctional system as well. In *Jones v. Coughlin*, a suit about hazardous fire conditions threatening women prisoners in the hospital building at Bedford Hills Correctional Facility, a settlement was reached requiring substantial renovation of the building and fire safety training for staff.

Judges being sworn into positions with the Family and Criminal Courts include (from left) David Gilman, named to the Family Court; William Miller, Richard D. Carruthers, Steven Lloyd Barrett, Richart T. Andrias and Herbert J. Adlerberg, named to the Criminal Court. Judge Barrett had served as an attorney in the Society's Federal Defender Services Unit before his appointment. He won a significant victory in the U.S. Supreme Court in 1980 in *Bifulco v. United States*, in which the High Court held that a special parole term – an additional punishment unique to the federal drug law – may not be imposed for a violation of the federal statute prohibiting drug conspiracies.

(New York Times Photo)

Following a four-week trial in the Southern District of New York in *Rahim v. Coughlin*, Project attorneys secured for a client the right to adequate medical care for his glaucoma without his having to submit to degrading strip searches. Those searches both offended his religious beliefs as a Sunni Muslim and were found by the court to be unreasonable under the Fourth Amendment.

Major advances were also made by Project attorneys in several other important cases: *Dumont v. Coughlin*, a class challenging the censorship, by officials at Clinton and Auburn Correctional Facilities of books and periodicals sent to inmates, *Anderson v. Coughlin*, a class action regarding inadequate medical care, recreation and access to legal materials in the disciplinary confinement units at several upstate prisons and *Honeycutt v. Coughlin*, a case which challenges as cruel and unusual punishment, conditions in the protective custody unit at Green Haven Correctional Facility.

Parole Revocation Defense Unit

The Bureau's Parole Revocation Defense Unit represented clients in 503 contested proceedings. This included 223 final revocation hearings, 35 preliminary hearings, 18 administrative appeals, 204 trial court proceedings (including habeas corpus and CPLR article 78 proceedings), and 23 appellate court matters. In addition, the Unit handled 75 cases through administrative negotiations and rendered legal advice to another 88 clients. The Unit received favorable dispositions in 58 percent of its final revocation hearings and its success rate in trial court proceedings was in excess of 71 percent.

In the realm of appellate litigation, several important cases were won. In *People ex rel. Horan v. New York State Division of Parole*, the Appellate Division, Second Department, reaffirmed the proposition that a parolee's incarceration in a sister state does not, by itself, bar his entitlement to a timely final parole revocation hearing. And in *People ex rel. Herrera v. Schager*, the Appellate Division, Second Department, held that a parolee's purported waiver of his right to be present at his final revocation hearing must be based upon legal non-hearsay evidence and cannot simply be inferred from his absence at the hearing.

The Unit's social work component placed 28 clients in residential treatment programs and 38 in outpatient programs and secured employment or job training programs for 28 individuals.

Myra K. Wallach, Managing Attorney of the Criminal Appeals Bureau and recipient of the 1981 Orison S. Marden Award, retired in June after 17 years service with the Society. Mrs. Wallach was often called "the heart of the Criminal Appeals Bureau." The Bureau's staff hosted a party in her honor at which time she received a resolution from the Board of Directors praising her devotion to the Society. With Mrs. Wallach are William E. Hellerstein, Attorney-in-Charge of the Bureau, and Archibald R. Murray, Executive Director and Attorney-in-Chief.

Juvenile Rights Division

The Honorable Howard A. Levine, Supreme Court of the State of New York, Appellate Division (Third Department) served as a guest speaker at the conference.

21st Anniversary Conference

In 1983, the Juvenile Rights Division came of age. In celebration of its 21st anniversary, the Division sponsored a one-day conference entitled, *Juvenile Rights – "The Age of Majority"*. The theme of the conference was the changing nature of juvenile law and practice and the directions in which these changes could lead. To develop some sense of those directions, we looked first to the past, to the origins of the Family Court and the Juvenile Rights Division.

In 1961, when The Legal Aid Society's Charles Schinitsky studied the Children's Court under the auspices of the Citizen's Committee for Children and the Association of the Bar of the City of New York, he found a court in which the due process requirement of fundamental fairness was generally abused. Rarely were children represented by counsel; rarely were charges explained to them or their families; the nature of a hearing, when it occurred, comported only with an individual judge's determination of what was "fair" since there were no legal guidelines; and, rarely were the consequences of adjudication explained. Unrepresented respondents often first realized the seriousness of what was happening when placed in detention or when their children were taken from them.

As a result, too many children passed directly from Court into indefinite periods of commitment in institutions having 'therapeutic' facilities of at least questionable value. What was occurring in the Children's Court chilled lawyers and social services professionals alike.

Mr. Schinitsky published a study of his findings and it was a major factor in the State legislature's enactment of the Family Court Act, which became effective in 1962. In that law the State created a hybrid court, one which was clearly a court of law with procedures governed by law, but it was also a court in which many of the issues to be determined were framed in the language of the social sciences – e.g. does a child need "supervision, treatment or confinement".

To assure the development of a Court consonant with its intent, the legislature mandated the assignment of counsel for children so that they would be properly represented, making New York the first State in the country to establish this right for children. The legislature expressed its determination that due process of law should be used in the Family Court, and it stressed that counsel was indispensable in achieving due process in the form of a dispositional order tailored to meet the needs of the individual child. It also affirmed the traditional role of the courts in reviewing, under the Constitution, the application of the law. Five years later, in 1967, the U.S. Supreme Court cited the New York experience, and raised the child's right to counsel to federal Constitutional dimension and thus made it mandatory throughout the country.

But in 1962 there were no lawyers for children. Thus, to fulfill the legislative intent of the new Act, The Legal Aid Society's Juvenile Rights Division (JRD), was created to provide representation for children in New York City's five Family Courts. It had a staff of three lawyers but no body of law existed anywhere in the nation to guide them. However, legislative intent – the provision of due process – was clearly expressed in the new law. Similarly, their obligations as attorneys were clearly defined in the Canons of Ethics. Thus, the three attorneys determined that their responsibilities to

their clients included securing for them the due process protections guaranteed to adults. While at the same time they were obligated to protect and defend their clients' unique rights as children, they believed the integrity of the family was to be maintained wherever possible. They knew their belief was supported by a rapidly growing body of literature. Further the treatment and rehabilitation of children were the goals of the Court, and the new law was clear in its intent that they as attorneys were mandated to assist the New Court in achieving these goals. Their practice reflected their philosophy as they sought to implement their clients' due process rights in the Family Court and further delineate and define these rights at the appellate level.

Over the following 21 years, the body of law governing our practice, until recently, was developed in state and federal courts, including the U.S. Supreme Court, generally in response to our cases. At the same time, in recognition of the hybrid nature of the Court, we were developing our own multidisciplinary method of representation and began utilizing social workers whenever appropriate in order to fulfill our own responsibilities. Thus current juvenile case law and practice, throughout the country, as well as in New York, are largely attributable to the vision and efforts of these three lawyers, passed on to and developed by a multi-disciplined Division staff that today numbers 159.

The Juvenile Rights Division's 21st Anniversary seemed an appropriate time to bring together members of the juvenile justice and child welfare systems in New York State and throughout the country, to discuss the new developments in the systems which are so critical to the lives of children subject to Family Court jurisdiction.

The Conference was held at the Association of the Bar of the City of New York on May 21, 1983, and approximately 400 people attended. Guest speakers included the Honorable Carol Bellamy, President of the New York City Council and the Honorable Howard A. Levine, Supreme Court of the State of New York, Appellate Division, (Third Department). Our luncheon speaker was the Honorable Albert Vann, Chairman of the New York State Assembly Committee on Children and Families. Bruce Cohen, Chief Counsel to the U.S. Senate's Committee on the Judiciary, Subcommittee on Juvenile Justice, also addressed our luncheon guests. Later in the day, Gordon Raley, Staff Director, U.S. House of Representatives, Committee on Education and Labor, Subcommittee on Human Resources, spoke to Conference participants.

Three persons were honored at the Conference for their outstanding contributions to the welfare of children in our State: Charles Schinitsky, founder and Attorney-in-Charge, Retired, of the Juvenile Rights Division; the Honorable Edith Miller, Justice of the Supreme Court of the State of New York and Administrative Judge of the Family Court of the State of New York, City of New York and the Honorable Joseph R. Pisani, New York State Senate and Chairman of the Temporary State Commission on Child Welfare, the architect of much of the child welfare legislation enacted in the last 10 years.

Workshops dealt with diverse substantive and procedural issues critical to legal and social service practitioners.

By bringing together individuals knowledgeable in their respective fields, by giving them an opportunity to address issues of central concern with others sharing those concerns, it is our hope that we achieved our aim. That aim was to create an atmosphere in which groups of people would recognize their common interests and join forces on issues critically impacting the lives and welfare of the children of New York State. We believe this is the most appropriate conclusion to the celebration of our 21st Anniversary because, indeed, it is the most appropriate way to begin our next 21 years.

The Division received invaluable assistance from the Civil Support Division and its Chairperson, Mrs. James B. Liberman. Mrs. Liberman's guidance in our planning stages and her Division's organization of all activities on the day of the Conference made our celebration possible. We are most grateful.

Organization

Although the Conference was a high point for the Division in the last year, its staff continued to work prodigiously to meet its commitment to representation of the highest quality consistent with the special responsibilities the Code of Professional Responsibility imposes upon attorneys for children. Supportive services enable the trial staff to provide adequate and complete case representation. Continuity of representation ensures that each client, during all stages of the case, is represented by an attorney with full knowledge not only of the case itself but of all antecedent actions taken.

The JRD, charged with legal representation of juveniles who are the subject of Family Court proceedings in the five boroughs of New York City, is the largest juvenile defense organization in the country. Its staff of 159 persons includes 77 lawyers,

33 social workers and paraprofessionals, nine investigators, 38 clerical people, one Director of Management and Planning and one Director of Management Information.

In fiscal 1983, the JRD was assigned to approximately 17,000 petitions. Of this total approximately 41 percent involved child protective proceedings in which the law guardians were assigned to represent children alleged to have been abused and/or neglected, and children involved in termination of parental rights proceedings. Approximately 31 percent involved either juvenile delinquency proceedings or juvenile offender proceedings which were removed to Family Court and approximately 21 percent concerned youngsters alleged to be persons in need of supervision (PINS). The remaining seven percent of the petitions encompassed miscellaneous proceedings such as custody and guardianship.

The JRD operates in a decentralized fashion with a centralized management staff and centralized special units. The Division's five field offices are located within or close to the five Family Courts which they serve. Each office is staffed by trial attorneys and social services, investigative and clerical staffs. Responsibility for the integration of these staffs and for the daily operation of each office rests with the attorney supervisors. They in turn are accountable to central management for the functioning of their offices. The central administrative office houses the central management staff as well as the Directors of the specialized units.

The Honorable Carol Bellamy, President of the New York City Council, served as a guest speaker at the conference.

The Division's functional Units are structured as follows:

The Law Guardians

The Division's law guardians serve as counsel to youngsters in Family Court proceedings.

Investigative Unit

This Unit aids attorneys in developing and preparing cases. Investigators gather substantive evidence, locate and interview potential witnesses, marshal relevant documentation, serve subpoenas, appear as witnesses and prepare reports.

The Appeals and Law Reform Unit

Law Reform Section:

This section pursues litigation within the juvenile justice, child welfare and educational systems, aimed at correcting system-wide abuses that are not readily corrected in case-by-case litigation, as well as litigation aimed at clarifying issues of law.

Appeals Section:

This section represents youngsters seeking relief from Family Court intermediate orders and dispositions through the appeals process.

Training Unit

This Unit provides detailed training to all new attorneys and ongoing training to all attorneys in all Units.

Juvenile Services Unit

This Unit consists of a group of social workers, educational consultants and paraprofessional program counselors who are responsible for providing services which are crucial to the effective representation of our clients in a court where a number of the issues are framed in the language of the social sciences.

Radical Changes in Family Court Practice

In this past year, the pressures, problems and demands faced by our staff have multiplied as a result of several factors.

Child Protective Proceedings—The nature of our practice continues to change with the Court's greater emphasis on child protective cases, including termination of parental rights. The media continues its extensive coverage of children who suffer injury in their own homes and foster care residences. The vigor in the enforcement of child-protective and child welfare laws continues to grow as it reflects society's and the legislature's commitment to protecting

abused and neglected children. In 1981, such cases were slightly more than 30 percent of our caseload; two years later, in 1983, they are 41 percent of our caseload - an increase of close to 37 percent.

Child Welfare Reform Act of 1979 (CWRA) effective 1981. Enacted as a set of amendments to Title IV of the Social Services Law, the CWRA has begun to have a major impact on our representation of children in neglect, abuse and PINS cases. Designed to require preventive services and to discourage the unnecessary placement of children in foster care as well as to expedite permanency planning for children already in foster care, the requirements of the Act and its regulations have resulted in more detailed and complex fact-finding and dispositional hearings in neglect and abuse cases. These hearings require extensive case preparation by the lawyer and social worker, who in addition, must be mindful that they are dealing with the lives, the safety and the welfare of the children they represent.

Juvenile Delinquency Procedure Code, effective July 1, 1983. This Code, which adapted and codified much of the *Criminal Procedure Law*, has expanded the requirements that must be met to provide effective representation. It has also dramatically increased the role of the prosecutor from intake through disposition, a radical change in Family Court law. Thus, these many changes have increased the length and complexity of delinquency proceedings. They also reflect a change in society's and the legislature's view of the young offender. Juvenile law now is being substantially affected by criminal law legislation.

Changes in Family Court Structure—The legislature has increased the number of judges now sitting in the Family Court. As a result of that increase and the return to Family Court of all but two New York City Family Court judges assigned to other courts, the number of working court parts has increased substantially. In the short space of one and a half years, there are eight additional judges sitting in New York City's Family Courts. In this time period, we have been unable to add any additional staff to meet the demands created by eight new parts.

Changes in Office of the Prosecutor—The Corporation Counsel of the City of New York is implementing the City's policy decision to substantially strengthen its Family Court prosecutorial offices. Thus Corporation Counsel's Family Court branch, the Division's chief adversary in the Family Court, has increased its staff and augmented all its resources. Pursuant to the new *Juvenile Delinquency Procedure Code*, this staff is mandated to play a much more active prosecutorial role in juvenile delinquency proceedings — e.g. they now appear in *all* dispositional hearings. This not only lengthens hearings, it renders them more complex. Numerous motions must be made and responded to, and numerous issues must be litigated. Since the effective date of the new law, it has become clear that a new body of law is quickly developing around this section alone, and this section represents just one of a number of changes made by the Code.

In addition, by October, 1983, Corporation Counsel plans to have institutionalized a system of vertical representation in Family Court. Thus, the time and logistical pressures on all Court personnel and procedures will continue to increase. Also, by October, 1983 Corporation Counsel will have implemented a computerized case tracking system.

The impact of these changes on our practice has become a matter of grave concern to the Division as we struggle to handle cases which involve the physical, psychological and emotional well-being of children. The JRD is facing and will be faced with a great many new demands over the next several years. In order to meet these challenges adequately the JRD is committed to maximizing its resources. To this end, we added a number of key management persons in the last year. Ellen Fried, formerly an attorney in the Society's Criminal Defense Division, an Assistant Professor of Clinical Law at Hofstra Law School and then Assistant Director of the Fund for Modern Courts, Inc., became the Division's new Director of Training. Stewart Weinstein, a staff attorney with several years of experience in the Division's New York County office and in the Appeals and Law Reform Unit, was selected as the Assistant Director.

Robert Fuld, a social worker with eight years of case work and administrative social work experience, joined the Society to head its Juvenile Services Unit. Mr. Fuld had been Project Director at the Family Union, a preventive service program on the lower East Side and is the recipient of numerous service awards. Robert Kahn, the supervising social worker in Bronx County, was promoted to the Assistant Director's position. His experience included staff social work positions in New York, Kings and Bronx Counties, giving him an excellent perspective on the entire Division.

The JRD is indeed fortunate to have acquired the services of these talented individuals, because each has brought to his or her new position enthusiasm

and welcome new perspectives.

Additionally, to meet the many new demands placed on staff, we have requested additional resources from the State. We are also preparing to computerize our Division for case tracking and informational purposes.

Appeals and Law Reform Unit

The Division recognizes that adequate representation of children does not end at the conclusion of a Family Court case. Our Appeals and Law Reform Unit pursues all available avenues to protect the legal rights of the Division's clients.

With the increasing complexity in the Juvenile Rights Division's practice, the Appeals and Law Reform Unit has assumed an ever-widening variety of functions.

The Unit is responsible for the preparation of appeals from Family Court determinations in the respective Appellate Divisions and Court of Appeals, as well as the handling of federal civil rights class actions and other affirmative litigation addressing systemic abuses in the juvenile justice, education and child welfare areas.

Unit attorneys respond to complaints from clients, law guardians, and, frequently outside agencies' ombudsmen. They may negotiate with relevant officials, and, where negotiations fail, may litigate to eliminate abuses.

Additionally, the Unit functions as a vital back-up resource for the law guardians in Family Court, providing technical assistance by researching and writing motions, briefs and memoranda on unique legal issues arising in Family Court practice and by initiating special proceedings, such as writs of *habeas corpus*, where necessary to effectuate clients' legal rights. These requests can be both voluminous and complex.

Law Reform Section

In its affirmative class action litigation, the Law Reform Section won significant victories at the appellate level during the past year. The United States Court of Appeals for the Second Circuit affirmed the decision of the United States District Court, Southern District of New York, striking down New York's juvenile preventive detention statute as unconstitutional. The case, *Schall v. Martin*, reported *sub nom Martin v. Strasburg*, 689 F.2d 365 (2d Cir. 1982), has been appealed by the State to the United States Supreme Court and the case has attracted considerable national interest from both juvenile and criminal justice practitioners. The Supreme Court will hear the matter in the Fall, 1983 Term.

The Second Circuit also affirmed the decision of the United States District Court, Southern District of New York, in the Division's favor in its enforcement proceedings in *Pena v. N.Y.S. Division for Youth*, a landmark case establishing constitutional standards regarding the utilization of solitary confinement, administration of psychotropic medication and mechanical and physical restraints in New York State's secure juvenile facilities. The Unit has continued to monitor implementation of both decisions.

Additionally, the Law Reform Section completed an extensive trial in the United States District Court, Western District of New York, in the case of *King v. Carey*, a challenge to programmatic practices in four upstate Division for Youth camps. Several other juvenile facilities have been visited by Section attorneys, conditions reviewed and improvements negotiated.

Enforcement monitoring and further efforts to finalize court decrees also have been continued in two other major class action lawsuits, *Lora v. New York City Board of Education*, 456 F.Supp. 1211, *modified* 623 F2d 428 (2d Circ. 1980), a case involving New York City's special day schools for emotionally disturbed children, and *Ronald W. v. Dunston*, 80 Civ. 1796 (S.D.N.Y. 1980), a challenge to the continued detention of children at Spofford Juvenile Center following their placement with New York State Division for Youth.

The recent enactment of the new *Juvenile Delinquency Procedure Code*, significantly altering juvenile delinquency practices statewide, has created a major challenge to the Law Reform Section in its role of providing back-up assistance to the Division's staff.

Law Reform Section attorneys participated in various training sessions sponsored by the New York State Bar Association's Special Committee on Juvenile Justice and the Appellate Division, First Department, Office of Projects Development, in conjunction with New York County Lawyers' Association and The Association of the Bar of the City of New York. Further our attorneys commented on legislative amendments to the Code proposed during this past year's session. Presently they are responding to a number of questions raised concerning interpretation of Code provisions, as well as determining if litigation is necessary.

Finally, the Law Reform Section prepared comments on proposed federal Department of Education,

New York State Department of Social Services and New York State Division for Youth regulations affecting the Division's clients. Responding to requests from government agencies, the Section also prepared testimony for public hearings on issues including the problems of minority youth; a proposed detention facility in lower Manhattan; counsel for children in foster care proceedings; retention of PINS jurisdiction in Family Court and fingerprinting of children in public schools.

Appeals Section

The appellate function of the Unit continues to increase in complexity. Termination of parental rights and other child-protective cases, matters often involving voluminous trial records and intricate constitutional issues, have consumed more and more of the Appellate Courts' attention. The Unit was involved in several significant cases in these areas during the past year.

The Unit has represented many children in appeals from orders made in termination proceedings. In most cases, parental incapacity had been clearly established and past visitation between parent and child had been harmful to the child's best interests. However, in two cases, atypical circumstances led the Unit to believe that atypical solutions would best promote the interests of the children involved.

In *Matter of Daniel A.D.*, the child had been placed in the custody of a child care agency shortly after his birth in 1971. His mother was suffering from a serious mental illness and his father was estranged from his mother. The agency supervised Daniel's care in a foster home.

With little hope for improvement in the mother's condition, the agency commenced a proceeding in 1974 to terminate her parental rights. This required a finding by the Court that now and for the foreseeable future, the mother would be unable to care for her son by reason of mental illness. The purpose was to free Daniel for adoption and a family situation better than foster care.

There were nine years of hard-fought litigation, two trials in Family Court and appeals to the Appellate Division and the Court of Appeals. In all of those proceedings, Legal Aid law guardians represented Daniel. Doctors agreed that the mother was suffering from mental illness, but were somewhat equivocal as to her capacity in the future, which is always the most difficult issue to determine in mental illness termination cases. The child care agency, mindful of many years experience with the mother, was determined to achieve termination of her rights.

Lenore Gittis, Attorney-in-Charge of the Juvenile Rights Division, (left) congratulates Rhoda J. Cohen, who was sworn in as a Judge of the Family Court. Ms. Cohen served as Attorney-in-Charge of the Juvenile Rights Division's Staten Island office before her appointment.

At a point in the proceeding when it was possible to do so, though imprudent, the foster parents adopted Daniel. After nine years he had become very attached to them and they to him. If the mother were to prevail in the termination proceeding, or in a Surrogate's Court proceeding to vacate the adoption, the adoption would be nullified.

With a second round of appeals already briefed and pending in the Appellate Division, the law guardian believed that the parties were at last ready for a reasonable settlement of the contest. Interviews with Daniel had led the Division's law guardian and social worker to conclude that periodic visitation between mother and child would not be harmful to the child. At a conference in Surrogate's Court, the law guardian proposed the outlines of a settlement which was later accepted. In the settlement, the mother renounced her parental rights, allowing the adoption to stand. She was awarded rights of visitation with Daniel and the agency agreed to provide assistance from social workers. The agency and the law guardian withdrew their appeals.

In the case of the *Marturin Children*, a case involving older children, a similar open adoption plan was achieved as an alternative to protracted appeals.

Many termination cases do not lend themselves to open adoption plans – usually because past visitation between biological parent and child has proven detrimental to the child's emotional health. However,

the above examples are reminders that there are no uniform answers in termination cases. Each disposition must be individualized to suit the needs and interest of the particular child involved and lawyers and social workers must have time to explore possibilities inherent in each situation.

In the juvenile delinquency area, a number of appeals were taken. The following are a few examples:

In *Matter of Isaac W.*, 89 A.D.2d 831 (1st Dept. 1982), the Family Court found the juvenile had committed acts constituting assault in the third degree. On appeal from the order adjudicating the boy a juvenile delinquent, the law guardian argued that the delinquency petition was jurisdictionally defective in that it failed to allege an essential element of the crime. The Appellate Division agreed with the law guardian's position that a delinquency petition, like an information in a criminal proceeding, must set forth every element of the offense charged and the respondent's commission thereof. The adjudication was therefore reversed and the petition dismissed.

In *Matter of John G.*, 91 A.D.2d 685 (2nd Dept. 1982), the Family Court found that the juvenile had committed acts constituting robbery in the second degree and, as a result of that finding, placed the boy in a state institution. On appeal, the law guardian argued that the hearing at which the boy had been found guilty was fundamentally unfair. The boy's law guardian had been deprived of prior statements which had been made by witnesses who testified against the boy. The Appellate Division agreed, stating that the Family Court failed "to ensure that the [appellant] receive[d] the full benefit of [the] witness[es'] statements for impeachment purposes" and that this error could not be deemed harmless. The placement order was reversed and the proceeding remanded for a new hearing.

Training Unit

In order to restructure our training program, we hired a new director and assistant director for this Unit. They have undertaken an extensive review and assessment of staff training in light of the many changes in practice that are occurring. Notwithstanding this ongoing review, the Unit trained a number of new attorneys entering the Division. This intensive, full time training consisted of preparation and distribution of materials; lectures; films; simulated video-taped exercises and feedback covering substantive and procedural law and practice: one-to-one supervision on individual cases; assistance in trial preparation and observation of courtroom practice and individual review and evaluation of each attorney's performance and progress.

The Division's Training Manual is being revised to include new areas of law and practice critical to staff attorneys. Our aim is to make it a more useful tool in court practice as well as a research and reference manual, thus making it our basic training document.

To meet continuing legal education needs of staff, the Training Unit distributed a variety of resource and reference materials. Primary amongst this material were several issues of the *JRD Newsletter*, a compendium of recent relevant decisions which is compiled and distributed by the Unit. In the past year, special issues were devoted to legislation and recent cases of the United States Supreme Court.

The Training Unit is developing special in-house programs for staff attorneys to enhance training in trial practice and preparation. The Unit also arranged for staff to participate in relevant conferences sponsored by outside organizations and received scholarships so that staff attorneys could attend intensive courses in trial advocacy sponsored by The Practising Law Institute and The National Institute for Trial Advocacy.

The Training Unit and Juvenile Services Unit management staff are developing joint training programs for lawyers and social workers to better integrate their activities.

Charles Schinitsky, founder of the Juvenile Rights Division, who is now retired, addresses the 21st anniversary conference of the Division. Mr. Schinisky serves on the Society's Board of Directors.

The Training Unit has been evaluating the need for additional materials. An inventory of available resources of the Unit will be distributed to the five boroughs. Systems for increased communication among the boroughs and more efficient and effective dissemination of information are being developed to improve the practice of staff attorneys.

Juvenile Services Unit

This Unit (JSU) was created 10 years ago to enable law guardians to provide appropriate representation in a court in which fundamental legal issues are framed in the language of the social sciences. The lawyer and social worker function as a team to meet both the legal and social service needs of a client. JSU is managed by a Director and an Assistant Director and consists of 33 social workers, educational consultants, and paraprofessional program counselors who are responsible for providing services which are critical to the effective representation of alleged and/or adjudicated PINS, delinquent, neglected and abused children.

The JSU provides social service assistance to trial staff attorneys on many of the cases they refer. Issues are raised in the majority of our cases which may require social work involvement. We do not, however, have sufficient JSU staff to provide that assistance. Presently, JSU can handle only 25 percent of the Division's cases.

Social work staff provides a panoply of services to our clients. Included are:

- client and family assessments
- evaluating the need for emergency and/or temporary removal and, where necessary, aiding in securing appropriate placement
- short-term counseling to aid in program formulation
- crisis intervention for provision of concrete services
- client advocacy to assist in negotiating the social service, the education system and the Court process
- development of individualized service plans
- development of alternative resources within families to avoid placement in foster care
- provision of referral services and utilization of community based programs aimed at diverting children from unnecessary involvement in the juvenile justice system
- monitoring of agencies' service delivery plans, clients' progress, and the implementation of dispositional orders of the Court
- recommendations of alternative dispositions to the Court

There are some differences in the social work practice involved in handling PINS and delinquency cases as contrasted with child protective proceedings. Practice specialization has developed within the Unit and social workers have the expertise to serve the needs of both client populations.

Child protective proceedings are of greater duration and complexity. The children are often very young. These proceedings require more comprehensive and intensive social service intervention. The social worker's expertise is utilized very early in the proceedings in order to fully represent and safeguard children's lives and welfare. Moreover, the social workers handling these cases provide a wide range of services not only to the child but to his or her family.

The services provided and the activities undertaken by JSU are directed towards the goals of achieving permanency, safety and the emotional well-being of children represented by the Division. Our experience has shown that social work impact on dispositions in original neglect and abuse cases is significant. A comparison of the outcome of original neglect and abuse cases referred to social workers with all neglect and abuse cases closed by the Division in the last year showed that children were more likely to remain with their families when the Division's social workers intervened. The cost benefit of this result to both City and State is self-evident.

Effects of New Laws

To a Unit that is working with already heavy caseloads, the demands presented by two new laws are overwhelming. The implementation of both the *Juvenile Delinquency Procedure Code* and the *Child Welfare Reform Act* (CWRA) has resulted in an increased role for the social service staff in all court proceedings. Compliance with these new statutes requires our staff to perform more extensive investigations and service-related work.

The CWRA mandates that preventive services be provided to all families who may become the subject of neglect and abuse proceedings. It further mandates that the Department of Social Service workers and/or case workers in preventive service and child care agencies maintain uniform case records (UCR's). These records include an assessment and description of the family's needs and service plan. It is imperative that the JSU social workers first determine if the agencies are complying with the CWRA, and if services have been offered. Workers must assess the

Members of the Civil Support Division volunteered their time to assist staff at the conference. Shown here are Mrs. Donald J. Robinson (left) and Mrs. John F. Lang.

appropriateness and consistency of treatment goals; the quality, extent and effectiveness of services delivered and the progress and response by clients and their families to preventive services received. For the Legal Aid social workers, these requirements translate into a mandate to conduct more comprehensive assessments of a larger number and wider range of services than they had to review prior to implementation of the new law.

Evaluation of this information is a time-consuming process in itself, but there are additional responsibilities as well. Since preventive services are provided to children and families in their own homes and these families have many serious problems, the status of the child must be carefully monitored to ensure that the child is not in imminent danger. Many home visits have to be made in many of these cases to insure that preventive services ordered by the Court are indeed effecting desired changes in the best interests of our clients. Communication with agencies mandated to provide these services is essential to monitor service delivery.

In cases where the provision of preventive service fails, reasons for failure must be identified and the Legal Aid social workers must work intensively with the attorney and the Court in assessing next steps.

The enactment and implementation of the *Juvenile Delinquency Procedure Code* has already impacted upon the nature of our practice in delinquency cases and has placed increased burdens on social workers involved with these proceedings. This means that even in emergencies in child protective proceedings, PINS and delinquency workers are simply not available to back up neglect and abuse workers. As noted above, the new Code mandates the presence of the prosecuting agency at all dispositional hearings. Now more adversarial in nature, these hearings require increased involvement by JSU social workers. They are required to work more intensively with each client to prepare an appropriate dispositional plan for presentation to the Court. They are often called upon to make recommendations and give sworn testimony to the Court. In addition, the prosecuting agency is now involved in all revocations of probation or conditional discharges. Therefore, the Unit is frequently called upon in these proceedings as well.

In addition to the direct social services provided to clients, the Juvenile Services Unit has other involvements. For the ninth consecutive year, the Unit has undertaken a commitment to summer employment for clients. Under the auspices of the City's Department of Labor Summer Youth Employment Program, the Unit developed and placed in summer jobs close to 300 adolescents who are or had been involved in Family Court proceedings. The Unit provides field work placement opportunities both for graduate students working toward their degrees in social work and for various types of undergraduate students.

The Legal Aid Society
Report of Independent Accountants

To the Board of Directors of
The Legal Aid Society

In our opinion, the accompanying balance sheet and related statements of income, expenses and changes in fund balances and of functional expenses present fairly the financial position of The Legal Aid Society at June 30, 1983 and 1982 and the results of its operations and the changes in its fund balances for the years then ended, in conformity with generally accepted accounting principles consistently applied. Our examinations of these statements were made in accordance with generally accepted auditing standards and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

Price Waterhouse

New York, New York
September 6, 1983

Balance Sheet

	June 30, 1983	June 30, 1982
Assets		
Cash	$ 1,208,690	$ 773,495
Receivables from governmental agencies for program services performed	1,145,017	1,880,135
Marketable securities, at lower of cost or market (Notes 1 and 4)	5,722,129	4,797,566
Equipment and leasehold improvements, at cost less accumulated depreciation and amortization of $672,444 in 1983 and $430,348 in 1982 (Note 1)	785,815	841,856
Deferred charges and other assets	2,192,310	1,961,468
Total assets	$11,053,961	$10,254,520
Liabilities and fund balances		
Accrued payroll and other employee expenses	$ 2,730,220	$ 2,247,636
Other accrued expenses and liabilities	2,628,382	2,835,289
Funds received for services not yet performed	682,670	1,068,077
Total liabilities	6,041,272	6,151,002
Fund balances (Note 5):		
Unrestricted, including $2,834,400 in the Centennial Fund	4,307,056	3,423,025
Restricted, including $400,000 in the Centennial Fund	705,633	680,493
Total fund balances	5,012,689	4,103,518
Total liabilities and fund balances	$11,053,961	$10,254,520

The Legal Aid Society
Statement of Income, Expenses and Changes in Fund Balances
For the Year Ended June 30, 1983 with Comparative Totals for 1982

	Criminal Defense Division	Civil Division	Juvenile Rights Division	Volunteer Division	Total 1983	Total 1982
Funds awarded by governmental agencies applied to program services (Note 2)	$34,401,819	$1,547,747	$5,763,259	$563,635	$42,276,460	$41,202,884
Less–Program expenses (see accompanying statement)	(34,376,129)	(5,307,555)	(5,765,111)	(911,850)	(46,360,645)	(44,241,040)
Excess (deficiency) of program expenses over funds awarded	$ 25,690	($3,759,808)	($ 1,852)	($348,215)	(4,084,185)	(3,038,156)
Cost of support services (see accompanying statement):						
Administrative expenses					(2,326,922)	(2,098,149)
Fund-raising expenses					(392,496)	(322,559)
					(6,803,603)	(5,458,864)
Other operating income:						
Contributions, including net income from benefits and other special events of $302,733 (1982–$297,994), donations for the Volunteer Division of $71,400 (1982–$50,500), and other miscellaneous income					3,699,451	2,872,753
Interest and dividend income					756,926	652,979
Funds awarded by governmental agencies applied to administrative expenses (Note 2)					2,263,347	2,028,730
Court awards for services (Note 3)					83,308	350,624
Excess (deficiency) of operating income over operating expenses – net operating income (loss)					(571)	446,222
Nonoperating items:						
Bequests and other nonrecurring contributions (Note 9)					339,206	126,398
Net gain (loss) on investments (Note 4)					570,536	(171,105)
Increase in fund balances					909,171	401,515
Fund balances at beginning of year					4,103,518	3,702,003
Fund balances at end of year (Note 5)					$ 5,012,689	$ 4,103,518

The Legal Aid Society
Statement of Functional Expenses
For the Year Ended June 30, 1983 with Comparative Totals for 1982

	Program services				
	Criminal Defer Division	Civil Division	Juvenile Rights Division	Volunteer Division	Total
Professional staff salaries	$16,440,862	$2,032,656	$2,552,857	$383,433	$21,409,808
Support staff salaries	7,836,782	1,400,205	1,365,168	227,068	10,829,223
Fringe benefits and other employee costs	5,838,111	808,030	936,500	144,141	7,726,782
Total employee expenses	30,115,755	4,240,891	4,854,525	754,642	39,965,813
Occupancy costs	1,599,155	584,342	358,122	71,101	2,612,720
Communication expenses	687,975	87,345	135,509	16,340	927,169
Office operating expenses	564,553	129,583	134,936	24,872	853,944
Purchases and leases of furniture and equipment	514,415	120,939	145,441	19,313	800,108
Law books and reference materials	186,400	96,981	49,472	10,738	343,591
Trial minutes	293,141	1,895	23,022	1,005	319,063
Cost of investigations and expert witnesses	233,788	13,029	22,199	7,581	276,597
Fees for professional services					
Travel	153,439	17,606	34,092	4,672	209,809
Other	27,508	14,944	7,793	1,586	51,831
Total expenses–1983	$34,376,129	$5,307,555	$5,765,111	$911,850	$46,360,645
Total expenses–1982	$33,233,824	$4,782,184	$5,394,605	$830,427	$44,241,040

Support services			Total expenses	
Administrative	Fund Raising	Total	1983	1982
$ 595,035	$105,261	$ 700,296	$22,110,104	$22,759,463
559,632	89,253	648,885	11,478,108	9,671,931
271,407	45,498	316,905	8,043,687	7,183,223
1,426,074	240,012	1,666,086	41,631,899	39,614,617
119,037	24,229	143,266	2,755,986	2,568,300
28,005	45,897	73,902	1,001,071	1,061,855
114,351	27,424	141,775	995,719	827,910
38,597	22,468	61,065	861,173	864,455
10,459	2,902	13,361	356,952	322,251
			319,063	355,487
			276,597	290,495
368,127		368,127	368,127	238,115
13,386	1,220	14,606	224,415	254,591
208,886	28,344	237,230	289,061	263,672
$2,326,922	$392,496	$2,719,418	$49,080,063	
$2,098,149	$322,559	$2,420,708		$46,661,748

The Legal Aid Society
Notes to Financial Statements
June 30, 1983 and 1982

NOTE 1–SUMMARY OF SIGNIFICANT ACCOUNTING POLICIES:–

The financial statements include the accounts of all divisions and funds of the Society and all programs administered by the Society. The following is a summary of significant accounting policies consistently followed by the Society in the preparation of its financial statements.

Support and revenue:

Funds awarded by governmental agencies are recorded on the accrual basis. Contributions, bequests and pledges are generally recorded in the period in which they are received; however, contributions designated by donors for future periods are deferred and recorded as income in those periods. No amounts representing the estimated value of donated services or in-kind contributions are included in the financial statements.

Expense allocation:

Professional and support staff salaries are charged to the various programs on a person-by-person basis corresponding to the amount of time spent on each program, as determined by the attorneys in charge of such programs, and to the support services on an actual basis; fringe benefits and other employee costs are allocated on an overall basis, corresponding generally to the allocation of salary expenses. All other expenses can generally be identified with the program or support service to which they relate and are charged accordingly.

Furniture and equipment:

Purchases of furniture and minor equipment are not significant and are therefore charged directly to income as incurred. Projects involving expenditures for major equipment and/or leasehold improvements (aggregating $186,055 in 1983 and $267,241 in 1982) are capitalized and amortized over their estimated useful lives or the term of the lease, whichever is shorter. Depreciation and amortization amounted to $242,096 in 1983 and $201,723 in 1982.

Income taxes:

The Society is incorporated as a not-for-profit organization, exempt from federal income taxes under section 501(c)3 of the Internal Revenue Code.

Marketable securities:

Marketable securities are recorded at cost or, if donated, at market value on date of donation, less reserves for decline in market value of the portfolio below cost, if any. Gains and losses on the sales of securities are recorded when realized.

NOTE 2–DESCRIPTION OF THE SOCIETY'S BUSINESS AND SOURCES OF INCOME:

The Society's four operating divisions – Criminal Defense, Juvenile Rights, Civil and Volunteer – provide legal services to the indigent of New York City.

The Criminal Defense and Juvenile Rights Divisions are funded under contracts with agencies of New York City, New York State and the federal government. These governmental agencies solely provide these Divisions' revenues and award funds either directly to the Society or to city agencies that in turn award the funds to the Society.

The Civil Division relies heavily for support on contributions from the private sector including, in particular, many of New York City's law firms and lawyers. In the year ended June 30, 1983, approximately 76% of the cost of program services provided by this Division was funded by private support.

The legal services of the Volunteer Division are primarily provided by volunteer New York City attorneys. The Division's expenses are funded by the federal government, agencies of New York City and by contributions from the public, including law firms.

Of the Society's total revenues during the year ended June 30, 1983, approximately $25,961,684 was awarded by city agencies, of which approximately $2,295,713 was awarded to such city agencies by federal and state agencies; additionally, approximately $15,703,413 and $2,567,092 were awarded to the Society by state and federal agencies, respectively.

NOTE 3–COURT AWARDS FOR SERVICES:

Fees are awarded by the courts for certain cases handled by the Society in prior years. These amounts are recorded as other operating income at the time of receipt since they do not relate to current program services.

NOTE 4–MARKETABLE SECURITIES:

At June 30, 1983, the Society's investment portfolio was diversified as follows:

	Cost or donated value	Market value
Cash equivalents	$ 426,581	$ 426,581
Common stock	9,417	17,833
Bonds and notes	5,286,131	5,506,531
Total	$5,722,129	$5,950,945

Net gains (losses) on investments during the years ended June 30, 1983 and 1982 are as follows:

	June 30, 1983	June 30, 1982
Net gain (loss) on sale of securities	$ 379,236	($243,805)
Decrease in reserve for decline in market value of securities below cost	191,300	72,700
Net gain (loss) on investments	$ 570,536	($171,105)

NOTE 5–FUND BALANCES:

At June 30, the fund balances consisted of the following:

	1983	1982
Unrestricted funds:		
Centennial Fund	$2,834,400	$2,834,400
Other	1,472,656	588,625
Total unrestricted funds	4,307,056	3,423,025
Restricted funds:		
Centennial Fund endowment	400,000	400,000
Other endowment funds	82,186	82,186
Special funds for designated purposes	223,447	198,307
Total restricted funds	705,633	680,493
Total fund balances	$5,012,689	$4,103,518

During the current year, $152,581 ($139,054 in 1982) was contributed for designated purposes and $127,441 ($143,494 in 1982) was expended for such purposes.

NOTE 6–LEASE OBLIGATIONS:

The following is a summary of the Society's minimum annual lease obligations, principally for office space:

Year ended June 30,	
1984	$2,072,000
1985	1,934,000
1986	1,599,000
1987	1,308,000
1988	951,000
1989-1993	1,917,000
Total	$9,781,000

These leases contain standard escalation clauses for increases in such expenses as real estate taxes, utilities and other building operating expenses.

NOTE 7–RETIREMENT BENEFITS:

Substantially all employees are covered by either The Legal Aid Society Retirement Plan (the "Retirement Plan") or by plans under collective bargaining agreements.

Contributions to the Retirement Plan for the years ended June 30, 1983 and 1982 were approximately $1,438,000 and $1,307,000, respectively, which include amortization of initial prior service cost over a forty-year period that commenced July 1, 1976 and amortization of prior service cost resulting from Plan amendments over a thirty-year period. The Society makes annual contributions to the Plan equal to the amounts accrued for pension expense.

A comparison of accumulated plan benefits and net assets for the Society's Retirement Plan at June 30 is presented below:

	June 30, 1982	June 30, 1981
Actuarial present value of accumulated plan benefits:		
Vested	$ 9,565,313	$8,093,783
Nonvested	1,604,269	1,493,134
	$11,169,582	$9,586,917
Net assets available for benefits	$ 9,630,821[1]	$8,488,836

The weighted average assumed rate of return used in determining the actuarial present value of accumulated plan benefits was 6-1/2%.

The Society also made contributions of $1,323,000 and $1,271,000 for the years ended June 30, 1983 and 1982, respectively, to union-sponsored defined contribution pension plans in accordance with the provisions of negotiated labor contracts; such contributions are based on employee compensation, as defined.

NOTE 8–CONTINGENCIES:

There are pending against the Society several legal actions which in the opinion of counsel will not result in material loss to the Society.

NOTE 9–BEQUESTS AND OTHER NONRECURRING CONTRIBUTIONS:

Included in bequests and nonrecurring contributions for the year ended June 30, 1983 is a $194,580 class action lawsuit settlement which was donated to the Society in lieu of distribution to the participants in accordance with the settlement agreement.

The 1983 Orison S. Marden Awards

Joan F. Mangones

George C. Colon

Joan F. Mangones, Attorney-in-Charge of the Civil Division's Staten Island Neighborhood Office, and George C. Colon, a Prison Legal Assistant in the Criminal Defense Division's Kings County Office, have been selected as the recipients of the 1983 Orison S. Marden Awards.

Mrs. Mangones has been with the Society for 16 years and has served as Attorney-in-Charge of the Staten Island Office since 1972. The many persons who nominated Mrs. Mangones pointed to her leadership abilities and her dedication and excellence in performing her responsibilities for the betterment of the Society's clients.

Nominations came from a number of staff lawyers and supervisors who spoke of her as a role model.

"Under her tutelage, I have been able to grow professionally both in the types of cases I handled as well as the level of courts in which I appeared," one staff attorney wrote. "Her firm support and guidance have enabled all the staff attorneys who have worked with her to reach their full potential; indeed, to give more than 100 percent to our clients."

"Joan has tirelessly provided legal services to the indigent community of Staten Island, first as a staff attorney and later as the office's managing attorney," another staff attorney wrote. "For the past decade Joan has trained some of the most outstanding attorneys in the Society's Civil Division including David Goldfarb (Bronx), Marshall Green (Park Place), Jeffrey Abrandt (Brooklyn Office for the Aging) and Ann Moynihan (Civil Appeals and Law Reform Unit).

". . . the Staten Island office has been involved in many of the Civil Division's most significant and far reaching law reform cases. The harmonious and supportive atmosphere that Joan has fostered in the office has resulted in a 'team effort' approach to the delivery of legal services . . . Joan exemplifies dedication to excellence and compassion in the representation of the poor."

Mr. Colon has been with the Society for 11 years. The scores of persons who nominated him for the award included staff attorneys, co-workers, inmates and high school and Department of Correction personnel.

The many nominations pointed to the excellence of service performed by Mr. Colon on behalf of Legal Aid clients. The nominators spoke of his compassion, understanding and willingness to go beyond his required duties to get the job done.

A staff attorney who had been assisted by Mr. Colon on a case wrote: "Mr. Colon's insight into the defendant's background and evaluation of what the defendant was telling me became invaluable. I found his judgement and commitment to this defendant to be in the highest tradition of the legal profession."

One of Mr. Colon's co-workers in the Prison Legal Assistants Program wrote: "He has a proven track record of dedication and loyalty to the ideals of the Society. Mr. Colon . . . goes beyond fulfilling his required duties. He utilizes his sensitivity to the needs of the defendants and the attorneys. He has never refused to aid or instruct his co-workers in overcoming the many obstacles that are placed before them."

"Mr. Colon has always been responsive to the needs of our clients," according to a supervising attorney. "He has demonstrated this quality under adverse conditions in the various correctional institutions when listening to the inmates' problems and by using his knowledge and expertise on their behalf."

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The Society extends its gratitude to Chief Investigator Harold Townes and to Photographers Clint Thorne and Henry Murcia for their assistance in taking photographs for this report.

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Petitioner's Reply Brief

No. 81-1374

Office - Supreme Court, U.S.
FILED
JAN 4 1984
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

October Term, 1983

BARBARA BLUM, individually and in her capacity as Commissioner of the New York State Department of Social Services,

Petitioner,

against

ELLEN STENSON, individually and on behalf of all other persons similarly situated,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

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ARGUMENT

1. Congressional Intent—Market Rates and Upward Adjustments of the Lodestar.

The controlling statute, 42 U.S. C. § 1988, provides only that attorney's fees to the prevailing party be "reasonable." Respondents' principal contention is that Congress intended that all fee awards under § 1988, including those to lawyers of non-profit organizations without any billing experience, be based on "prevailing [hourly] billing rates in the community." (Brief for Respondents, p. 15). They also argue that Congress intended to allow "upward adjustments" to such billing rates. (Brief for Respondents, pp. 23-24, hereinafter "Brief.")

Respondents assert that this interpretation of the word "reasonable" is "conclusively established" or "confirmed" (Brief, pp. 15 and 23) by the relevant legislative history. They rely on six cases—four cited in the Senate Committee Report and two cited in the House Committee Report: *Johnson* v. *Georgia Highway Express, Inc.*, 488 F. 2d 714 (5th Cir. 1974); *Stanford Daily* v. *Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974); *Davis* v. *County of Los Angeles*, 8 EPD ¶ 9444; *Swann* v. *Charlotte-Mecklenburg Board of Education*, 66 F.R.D. 483 (W.D. N.C. 1975); *Fairley* v. *Patterson*, 493 F. 2d 598 (5th Cir. 1974); *Torres* v. *Sachs*, 69 F.R.D. 343 (S.D.N.Y. 1975), *aff'd*, 538 F. 2d 10 (2d Cir. 1976) (Brief, pp. 15-17).

Respondents' interpretation is contrived. It turns on the manipulation of excerpts from the cases cited and is not supported by the legislative history as a whole or even the cited cases.

A. Market Rates

Respondents state that in *Johnson*, "courts are directed to consider the customary fee for similar work in the community." But in the paragraph containing that sentence, the court explicitly approves hourly rates as low as the $20 per hour prescribed by the Criminal Justice Act, or as low as fees authorized by minimum fee schedules. *Johnson* therefore upholds awards based on below market rates.

The second case cited in the Senate Committee Report, *Stanford Daily* v. *Zurcher*, is inapposite. There the attorneys seeking fees were private practitioners with established billing rates—$50 to $65 an hour. The court awarded an hourly rate at the bottom of counsel's scale—only $50 an hour—although the attorneys had considerable civil rights experience and were highly skilled.

The two remaining cases announce conflicting principles. In *Davis* v. *County of Los Angeles*, the court indeed awarded "normal hourly rates" and stated that fee awards for attorneys of a non-profit public interest law firm are to be calculated in the "traditional manner."[1] 8 EPD at 5048, 5049. But *Swann* v. *Charlotte-Mecklenburg Board of Education*, 66 F.R.D. 483 (W.D. N.C. 1975) points in the opposite direction. There, fees were sought by attorneys of the NAACP Legal Defense Fund and by private practitioners.[2] The court did not calculate hourly rates or a lodestar for any of the attorneys. The court also refused to be guided by the hourly rates of counsel for defendants—a

1. There is no further discussion of how fees are to be calculated.

2. Respondents, at pp. 22-23 of their brief, argue that *Swann* entailed a fee award only to a profit-making firm. This is not correct. See Brief Amici Curiae, NAACP Legal Defense and Educational Fund, and others, p. 11.

indication of rates prevailing in the community for similar litigation. Rather the court held that "obviously counsel for the defendants have charged more for similar though unsuccessful services than counsel for the plaintiffs will receive." *Swann*, 66 F.R.D. at 486. This tension between *Swann* and *Davis* led the Second Circuit to hold that the "clues in the legislative history point in opposite directions." *New York Ass'n for Retarded Children* v. *Carey*, 711 F. 2d 1136, 1149 (2d Cir. 1983).

Respondents take even greater liberties with the House Committee Report. They rely entirely upon the following footnote:

> [A] prevailing party is entitled to counsel fees even if represented by an organization or if the party is itself an organization. *Incarcerated Men of Allen County* v. *Fair* [507 F. 2d 281 (6th Cir. 1974)]; *Torres* v. *Sachs*, 69 F.R.D. 343 (S.D.N.Y. 1975) *aff'd*, 538 F. 2d 10 (2d Cir. 1976); *Fairley* v. *Patterson*, 493 F. 2d 598 (5th Cir. 1974).
>
> H. Rep. No. 94-1558, 94th Cong., 2d Sess., Sept. 15, 1976, p. 8, n. 16.

Thus *Fairley* and *Torres* are only cited to illustrate the principle that non-profit firms are *entitled* to fee awards.[3] Yet respondents cite those two cases to demonstrate that Congress had a "clear intention to base fee awards on market-value billing rates" (Brief, p. 17). The citation of a case in a committee report for one principle cannot imply Congressional approval of every proposition for which the case may stand. One court described that mental

3. Respondents ignore the third case cited in the footnote, *Incarcerated Men of Allen County;* that decision did not question a district court award of $2,000 for 134 hours, less than $15 an hour.

leap in legislative analysis as "turn[ing] pumpkins into carriages." *Matter of Gifford*, 688 F. 2d 447, 451 n. 3 (7th Cir. 1982) (en banc).[4]

The relevant paragraph of the House Committee Report, ignored by respondents, states:

> The third principal element of the bill is that the prevailing party is entitled to 'reasonable' counsel fees. The courts have enumerated a number of factors in determining the reasonableness of awards under similarly worded attorney's fees provisions. In *Johnson* v. *Georgia Highway Express, Inc.*, 488 F. 2d 714 (5th Cir. 1974), for example, the court listed twelve factors to be considered, including the time and labor required, the novelty and difficulty of the questions involved, the skill needed to present the case, the customary fee for similar work, and the amount received in damages, if any. *Accord: Evans* v. *Sheraton Park Hotel*, 503 F. 2d 177 (D. C. Cir. 1974); see also *United States Steel Corp.* v. *United States*, . . . [519 F. 2d 359 (3d Cir. 1975)].
>
> H. Rep. No. 94-1558, 94th Cong., 2d Sess., September 15, 1976, p. 8.

Thus, the principle adopted by the House Report is that the courts—not the Congress—must guide the inquiry

---

4. While one may assume that a majority of Congress reads committee reports, it is unrealistic to assume that legislators read, let alone adopt, every principle announced by every case cited in a committee report. Moreover, relying on a case in a committee report for every proposition suggested by the case can lead to anomalous results. Thus *Swann* and *Stanford Daily* can be cited for the proposition that counsel may obtain fees based on estimates of hours expended, a couclusion rejected by *Hensley* v. *Eckerhart*, —— U.S. ——, 103 S. Ct. 1933, 1939, 1941 (1983).

Respondents carry their argument to extremes: they assert that the mere citation of a case, *in a case*, cited in a one-house committee report is evidence of Congressional intent (Brief n. 24, p. 17).

into "reasonableness:" *Johnson* is referred to merely as an "example" of one approach found useful by the courts.[5]

B. Upward Adjustments in the Lodestar

Respondents contend that upward adjustments to the lodestar are appropriate to reward attorneys for exceptional results, high quality representation, the contingent nature of the award and the lost time value of money. They cite two of the four cases included in the Senate Committee report as "confirmation" that Congress approved such adjustments.

Stanford Daily and *Davis* did indeed grant upward adjustments, although neither mentioned the "lost time value of money."[6] It is difficult to identify Congressional intent, however, because a third case cited in the same paragraph of the same Committee Report leads to the opposite conclusion.

In *Swann* v. *Charlotte-Mecklenburg Board of Education*, 66 F.R.D. 483 (W.D. N.C. 1975), plaintiffs were seeking fees for a six-year period, from 1968 through 1974; the "lost time value of money" principle clearly supported an upward adjustment. The results obtained were exceptional. "Plaintiffs total[ly] accomplish[ed] . . . the aims of the suit." *Id.* at 484. Equally important, counsel were seeking

5. The two other cases cited in the quoted paragraph of the House Report are not useful. In *Evans*, the court merely adopted the *Johnson* factors without expressing an opinion on the correctness of an award of approximately $6 an hour. In *United States Steel Corp.*, the court held that a prevailing defendant may recover attorney's fees against the EEOC only if the EEOC action was undertaken in bad faith.

6. No case cited in the legislative history provided for upward adjustments for "the lost time value of money." See *infra*, p. 11.

fees for time expended in the Supreme Court where they achieved a landmark in urban school desegregation law. *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971). The fee award was contingent and success unlikely given the list of hurdles identified by the court. The case was difficult and novel and counsel's reputation, experience and ability, "exceptional." *Swann,* 66 F.R.D. at 486. Thus under respondents' argument an upward adjustment was appropriate. Yet the court awarded fees of $175,000, 15% *less* than the amount sought by plaintiffs, holding that a *downward* adjustment of a reasonable fee was appropriate. The court "did not wish to contribute unnecessarily to the overpricing of litigation in this or any other court." *Id.*

C. Overview of Legislative History

Two important conclusions are supported by the legislative history as a whole: First, Congress expected that guidelines controlling the inquiry into "reasonableness" would be established by the courts which have long supervised the legal profession and attorney's fee agreements.[7] Thus the committee reports provide examples of judicial insights into the parameters of "reasonableness;" they do not announce legislatively created or required principles. This also explains the emphasis on *Johnson* v. *Georgia Highway Express,* which sets forth general principles not viable until shaped by the courts. And it explains why the floor debates emphasize that the courts, not legislative history, will protect against excessive awards (Brief for Petitioner, p. 38).

---

7. *Allen* v. *United States,* 606 F. 2d 432, 435-36 (4th Cir. 1979) (and cases cited therein) (Contingent fee agreements are subject to judicial determination of "reasonableness").

Second, the principle connecting all of the cases cited in the Senate Committee Report is that a court must scrutinize a fee application much like a trustee accountable for the proper use of a fund. Awards, to be reasonable, must be made "with moderation." *Trustees* v. *Greenough*, 105 U.S. 527, 536 (1881). *Johnson* held that plaintiff has the burden of proving entitlement to the award sought; that below market rates are permissible; that time spent on investigations, compilations of facts and clerical tasks may be compensated at lower rates; that no fee award should be greater than the amount a litigant was contractually obligated to pay. *Stanford Daily*, *Davis* and *Johnson* held that fee awards should be reduced if there is duplication of effort or improper use of time. *Davis* added that fee awards must be reduced if there are deficiencies in the keeping of time records.[8] *Stanford Daily* held that a private practitioner's customary billing rate should be rejected if it is too high for the particular case. And in *Swann* the court entered a modest award to protect against the "overpricing of litigation." Fee awards when guided by these principles are—according to the Senate Committee Report, p. 6—"adequate to attract competent counsel, . . . [without] produc[ing] windfalls to attorneys."[9]

---

8. *The Manual for Complex Litigation* (5th Ed.), § 1.47(b)(3), recommends that plaintiffs' counsel be required to periodically submit their time records to the district court and defendants to assure frequent review of potential fee awards and to afford an early opportunity for challenge. A similar requirement has been announced by the Tenth Circuit. *Ramos* v. *Lamm*, 713 F. 2d 546, 553 (10th Cir. 1983).

9. Since *Maine* v. *Thiboutot*, 448 U.S. 1 (1980) and *Maher* v. *Gagne*, 448 U.S. 122 (1980), fee awards under § 1988 are available in routine cases. See discussions in *Matter of Johnson* v. *Blum*, 58 N.Y. 2d 454 (1983); *Matter of Rahmey* v. *Blum*, 95 A.D.2d 294, 466 N.Y.S.2d 350 (A.D. 2d Dept., 1983) (methodology for fee

(footnote continued on next page)

2. Fee Awards to Deter and Punish Defendants and to Avoid "Windfalls to Defendants."

Respondents argue that non-profit public interest organizations should be awarded more than compensatory fees to avoid a "windfall to defendants depending on the fortuity of the identity of the attorneys" seeking fees (Brief, p. 29). They also argue that an upward adjustment to the lodestar to compensate for the lost time value of money "reduces the incentive to unnecessarily prolong litigation" and will deter defendants from using their financial resources to overwhelm counsel for plaintiffs (Brief, p. 26, n. 41). These related arguments—that fee awards should be used to deter state employees from illegal and odious conduct and to punish state officials (in fact, the taxpayers) have occasionally been adopted by the courts.[10] But they are wide of the mark.

First, fee awards must vary with the status of plaintiff or his counsel because § 1988 was enacted to compensate plaintiffs' counsel, not to punish defendants. For this reason, *pro se* litigants may not recover fees. *Cofield* v. *City of Atlanta*, 648 F. 2d 986, 987-88 and n. 4 (5th Cir. 1981); *Turman* v. *Tuttle*, 711 F. 2d 149 (10th Cir. 1983) (and cases

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awards under § 1988 in state court proceedings is identical to that adopted in *New York Association for Retarded Children, Inc.* v. *Carey*, 711 F.2d 1136 (2d Cir. 1983)); *Matter of Pinkston* v. *Weinberg*, 468 N.Y.S.2d 51 (A.D. 2d Dept. 1983). Since fee awards against the State are granted routinely and in a wide range of cases, they must be moderate in light of Eleventh Amendment concerns. See *Brief Amicus Curiae, Commonwealth of Massachusetts*, pp. 17-18, n.15.

10. See, for example, *Ramos* v. *Lamm*, 713 F. 2d 546, 552 (10th Cir. 1983), citing *Copeland* v. *Marshall*, 641 F. 2d 880, 899 (D. C. Cir. 1980) (en banc).

cited therein). Employment discrimination suits brought by the United States or the EEOC do not result in fee awards against the state or any other defendent. 42 U.S.C. § 2000e-5(k); *Christianburg Garment Co.* v. *EEOC*, 434 U.S. 412, 422, n. 20 (1978). There is no "windfall" to defendant in such cases. Nor is there a "windfall" when the fee award is modest because of the inexperience of counsel; nor, therefore, when the fee award reflects an attorney's lower costs and overhead.[11]

Second, respondents misperceive the considerations that control decisions by state officials. The Commissioner of Social Services faces the loss of federal funds to the extent that she pays Medicaid claims not authorized by federal laws and regulations. At least one federal court has held that the Commissioner violates federal regulations if she fails to terminate, as soon as practicable, Medicaid benefits to persons whose SSI is terminated. *Crippen* v. *Dempsey*, 549 F. Supp. 643 (W.D. Mich. 1982). This need to comply with federal law explains Commissioner Blum's conduct in this case.

Third, fee awards against New York state officials *do not* derive from agency funds. Rather a common fund has been established by the New York legislature to satisfy all money judgments against state employees, including those for attorney's fees, that are the responsibility of the State's taxpayers. McKinney's Consolidated Laws of New York, Vol. 46, Public Officer Law § 17 (3) a; Chapter 50 of the

11. Moreover, the courts and Congress do not often punish defendants for violating a duty they owed to plaintiff by awarding more than a compensatory fee to plaintiff's attorney. *Ursic* v. *Bethlehem Mines*, 719 F. 2d 670, 677 (3d Cir. 1983).

Laws of New York, 1983.[12] Therefore, a fee award will not deter illegal conduct because it will have only a remote effect upon the programs of the Department of Social Services. *Copeland* v. *Marshall*, 641 F. 2d 880, 912 (D.C. Cir. 1980) (Wilkey, J. dissenting) (fee awards paid by the United States Treasury do not deter improper agency activities).[13] Moreover, some courts view high fee awards as providing plaintiffs with an incentive to unnecessarily prolong or complicate litigation. *Copeland* v. *Marshall*, *id.*, p. 911.

3. Fee Awards Sought by the Attorney General in Antitrust Cases.

Respondents chide the State for advancing inconsistent positions. They argue that the State of New York has sought fees based on market rates in antitrust cases (Brief, p. 20).

The more appropriate inquiry is whether the Attorney General has applied for fees based on market rates in § 1988 cases. He has not. He has sought fees based on costs. *See, e.g., Woods* v. *State of New York*, 494 F. Supp. 201 (S.D.N.Y. 1980). The practicality of fee awards based on

12. Appropriation of $3 million for, *inter alia*, "payments of judgments and settlements against state officers and employees for damages and attorneys' fees, costs or disbursements in civil rights actions in the federal courts."

13. Congress recognized that federal agency officials would consider the impact of attorney's fee awards against them only if agency funds were at stake. The Equal Access to Justice Act, 28 U.S.C. § 2412 (c)(2), therefore requires the payment of fees from agency funds "if the basis for the award is a finding that the United States acted in bad faith." But Congress did not take this step under § 1988: the legislative history establishes a Congressional intent to allow the creation of a separate common fund for the payment of all fee awards against state officials (Senate Committee Report, p. 5).

costs is established by the affidavit appended hereto.[14] It is typical of those filed by New York in support of a fee award under § 1988.

4. Upward Adjustments for "Lost Time Value of Money."

Respondents argue that many courts have allowed an upward adjustment to compensate counsel for the lost use of the fee award during the pendency of the litigation (Brief, pp. 23-24). The courts below did not rely on this factor to increase the lodestar. Moreover, such an adjustment is the equivalent of prejudgment interest which is not recoverable on awards of attorney's fees.

There is no support in the legislative history for prejudgment interest.[15] The Senate Report, p. 5, merely permitted interim fee awards under *Bradley* v. *School Board of the City of Richmond*, 416 U.S. 696 (1974). Moreover, when Congress has authorized prejudgment interest it has done so explicitly and under carefully defined circumstances. *See, e.g.*, 15 U.S.C. § 15(a) (prejudgment simple interest on

14. The practicality of fee awards to the Legal Aid Society based on costs is also established by Note 1 to the Society's Financial Statements, 1983 Annual Report, p. 52 (lodged with the Court). It provides: "Professional and support staff salaries are charged to the various programs on a person-by-person basis corresponding to the amount of time spent on each program, as determined by the attorneys in charge of such programs, and to the support services on an actual basis; fringe benefits and other employee costs are allocated on an overall basis, corresponding generally to the allocation of salary expenses. All other expenses can generally be identified with the program or support service to which they relate and are charged accordingly."

15. The authorities are divided on whether *post*-judgment interest should be paid on fee awards. See discussion in *Gates* v. *Collier*, 616 F.2d 1268, 1275, n.10 (5th Cir. 1980); *Carpa, Inc.* v. *Ward Foods Inc.*, 567 F.2d 1316 (5th Cir. 1978).

actual damages is authorized if party acted intentionally to delay litigation, or in bad faith).

Nor is prejudgment interest generally payable on fee awards. *Perkins* v. *Standard Oil Co. of California*, 487 F.2d 672, 675 (9th Cir. 1973); *Ramey* v. *The Cincinnati Enquirer Inc.*, 508 F.2d 1188, 1198 (6th Cir. 1974). This is especially so here because awards under § 1988 are made "as part of the costs," *Finney* v. *Hutto*, 437 U.S. 678, 695-98 (1978), and costs are unliquidated claims that do not accrue until judgment is obtained. *Cf. Moore-McCormick Lines* v. *Amirault*, 202 F.2d 893, 897 (1st Cir. 1953); *Louisiana & Arkansas Ry.* v. *Export Drum Co.*, 359 F.2d 311, 317 (5th Cir. 1966).

5. The Facts and Upward Adjustments to the Lodestar.

This lawsuit challenged the procedures followed by the State when a recipient loses "categorical eligibility" for Medicaid due to the loss of Supplemental Security Income ("SSI") benefits. As a result of the judgment obtained, the Department of Social Services may not terminate the Medicaid benefits of a recipient who is indisputably ineligible for Medicaid under the "categorically needy" eligibility criteria until it has determined that the recipient is also ineligible for Medicaid under the separate "medically needy" criteria.[16] If the recipient is found ineligible, the Department must provide notice and the opportunity to contest that determination at a hearing. These procedural safeguards augmented those already provided by federal and state directives.

16. Persons who receive SSI are mandatorily included in the Medicaid program ("categorically needy"). Persons who incur medical expenses that threaten a minimum standard of living are eligible as "medically needy." See discussion in *Crippen* v. *Dempsey*, 549 F. Supp. 643, 645 (W.D. Mich. 1982).

A. Respondents greatly exaggerate the benefits realized by the plaintiff class:

(i) This action did not result in an increase in the number of persons who are eligible for Medicaid.

(ii) Prior to judgment, recipients who lost their SSI benefits were not terminated from Medicaid "abruptly." (Brief, pp. 1, 45, n.88). Recipients had a grace period following notification of the termination of SSI benefits, to seek Medicaid under the "medically needy" standards (J.A. 106-111).[17] The record reveals that prior to the judgment, it took the State "upwards of two months" after federal notification of the termination of an individual's SSI eligibility to terminate Medicaid benefits (J.A. 115-16, §5). The point is illustrated by Stenson's individual case. Her benefits did *not* "abruptly" cease (Brief, p. 1). She was notified in July, 1978 that her SSI benefits would terminate in August (J.A. 31), but her Medicaid benefits continued until the following November (J.A. 23, ¶¶ 37 and 38) and her housekeeper was paid until December (J.A. 45, ¶ 5).[18]

(iii) This action did not result in a significant increase in the number of persons who receive Medicaid. Respondents' contention that this occurred is based on several false assumptions.

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17. The linchpin of respondents' argument that they achieved substantive benefits for the class, is their baseless claim that over a three year period, 113,688 recipients lost Medicaid benefits (Brief, p. 2, n.6). In fact, that number of persons lost SSI, not Medicaid, benefits (J.A. 219).

18. Nor was Stenson forced to pay for her medication (Brief, p. 2). Even after Medicaid was terminated in November her pharmacist provided medications without charge (J.A. 43, ¶ 12). He undoubtedly knew that Medicaid would pay for services rendered during the three-month period prior to the filing of a successful Medicaid application. *See,* 42 CFR § 435.914.

First, respondents assume that recipients who lose "categorical eligibility" incur sufficient medical expenses to qualify for Medicaid as "medically needy." The record establishes that this rarely occurs.[19]

Respondents' second assumption, unsupported by the record, is that federal[20] and state[21] notices to recipients

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19. As explained in a letter dated November 30, 1979 (J.A. 217-221), in November, 1979, petitioner sent a survey form (reproduced at J.A. 222) to 100 randomly selected class members whose SSI benefits had been terminated in August, 1977 due to financial ineligibility. Among the questions the survey asked was whether the class member had unpaid medical bills for which he/she needed assistance, a requirement for "medically needy" benefits (see J.A. 222). Fourteen of the sixteen class members responding answered in the negative (J.A. 218). This lack of need is further substantiated by a statistical summary of the result of the *Stenson* judgment prepared by petitioner in June, 1981 (Second Circuit Brief for Defendant-Appellant, July 30, 1981, footnotes on pp. 6-7). That summary revealed that only 16% (20,380) of the class members who were mailed the notices required by ¶ 11 of the Judgment, as amended (J.A. 267) requested restoration of their Medicaid benefits; and that approximately 76% (15,462) of those class members were found ineligible for such restoration, pursuant to ¶ 12 of the Judgment, as amended (J.A. 268), because subsequent to their SSI termination they had applied for Medicaid, were determined ineligible for Medicaid, and had been given the opportunity to contest that determination at a hearing. Moreover, of those few class members whose Medicaid benefits were restored prior to a determination of their eligibility for Medicaid (as required by ¶ 12 of the Judgment, as amended), approximately 75.5% (3,714) were thereafter found to be ineligible for those benefits. In summary, of the 20,380 persons requesting restoration, only 1,204 were found eligible for Medicaid as "medically needy". Moreover, the assumption that persons in this group would not have applied for Medicaid but for this lawsuit is highly speculative. See "second" and "third" assumptions in text, above.

20. The federal defendant's SSI termination notice states, "for information about any change in your Medicaid eligibility caused by this action you should get in touch with your local social services agency" (J.A. 32).

21. The notices which petitioner required New York's local districts to send, prior to the filing of this lawsuit, advised class members that their Medicaid benefits would be terminated as a result of the

(footnote continued on next page)

were ignored by most class members who met the "medically needy" eligibility criteria.

Respondents' third assumption is that most of the class members who met the "medically needy" eligibility criteria, and ignored or did not receive the above notices, would not have applied for Medicaid unless they received the court-ordered notice, although they received their monthly Medicaid card from their local district, and had caseworkers assigned by that district (*see* J.A. 23, ¶ 40). Respondent Stenson falls into this category. She applied for Medicaid, under the "medically needy" eligibility standard, sometime after she failed to receive her November, 1978 Medicaid card (J.A. 42, ¶ 11), before she filed this lawsuit and was found eligible in January, 1979 (J.A. 138, ¶ 4).

B. Nor can the 50% bonus awarded by the courts below be justified on the grounds of the complexity of the case or the efficiency of counsel.[22]

The entire "investigative stage" entailed a short set of interrogatories (J.A. 60-64). Of respondents' three "formi-

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SSI termination, and that if they had medical needs they could apply to their local district for Medical Assistance (J.A. 76). The district court noted that the majority of the local districts sent the required notices (J.A. 153), and that the notices sent by some districts also informed class members of their fair hearing rights (J.A. 154).

22. "Quality" upward adjustments depend upon proof of *unusual* efficiency of counsel. *Prandini* v. *National Tea Co.*, 557 F.2d 1015, 1019 (3d Cir. 1977); *Lindy Bros. Builders Inc.* v. *American Radiator and Standard Sanitary Corp.*, 540 F.2d 102, 118 (3d Cir. 1976) (en banc) ("heavy burden of proving entitlement" to "quality" adjustment is on plaintiff and can be established by proof of unusual efficiency; downward adjustments are also permissible if litigation is inefficiently pursued).

dable'' obstacles (Brief, p. 3), the first was illusory,[23] while the second and third entailed unexceptional legal research of federal regulations and procedural due process protections. The only issue petitioner appealed—the district court's conclusion (at J.A. 165-166) that petitioner was required to restore Medicaid benefits which had been terminated in the past—was *sua sponte* decided by the district court on its own research. None of the respondents' several briefs addressed respondents' entitlement to such relief.

A case is ''complex'' if it is found suitable by a district court for development under the *Manual for Complex Litigation* and proceeds to trial. Such cases entail three ''waves'' of voluminous discovery, at least four principal pre-trial conferences and may be followed by a protracted trial with adversary expert witnesses for economic or technical issues. They may include claims for millions of dollars by thousands of class members pursued under Rule 23(b)3 of the Federal Rules of Civil Procedure. The cases often entail so many opposing parties and attorneys that the court must appoint steering committees to guide the litigation and to avoid chaos. Under these standards the instant case is clearly not complex: it entailed virtually no disputed facts, provided class-wide injunctive relief only under Rule 23(b)2, FRCP, and was resolved on cross-motions for summary judgment based on the district court's analysis of federal regulations.

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23. The first obstacle is stated to be the involvement of three levels of government in the decision to terminate Medicaid benefits. However, all that was required of respondents was that they show entitlement to the relief sought. Respondents' counsel found it unnecessary to differentiate between the liability of the separate defendants. *See* respondents' brief in support of their motion for a preliminary injunction, and the proposed intervenor's duplicative brief for the same relief (Dist. Ct. docket entries 18 and 19, First Supp. Record on Appeal documents 44 and 45).

Respondents assert that their three attorneys were remarkably efficient because they moved for summary judgment on April 13, 1979, "less than one month" after petitioner moved for summary judgment (Brief, p. 5). However, respondents had filed preliminary injunction motions on March 20, 1979; their summary judgment motion merely repeated arguments made in the earlier submissions.[24]

Much of the time expended by counsel in the "enforcement stage" was unnecessary and therefore not properly billable to the taxpayers of New York. *Hensley* v. *Eckerhart, supra,* 103 S.Ct. at 1939-40; *See* also, Burger, C.J., concurring, 103 S.Ct. at 1943 (plaintiff must show time expended "was necessary to achieve the results obtained"). The first two motions for contempt, which were denied, and for which respondents were awarded attorney's fees over petitioner's objection (*see* J.A. 356), would not have been filed by attorneys billing their clients instead of their adversaries.

More than a month *prior* to the entry of the judgment, petitioner had directed New York's local social services districts to continue Medicaid benefits when SSI benefits were terminated (*see* J.A. 265; J.A. 263, ¶ 2). Respondents' counsel not only knew of that directive, they had approved its terms before it was sent. (*See* letter dated November 21, 1979, annexed to petitioner's memorandum in opposition to respondents' first contempt motion (Dist. Ct., Docket Entry 47, Record on Appeal, document 10).)

24. Respondents' further contentions regarding the experience of their counsel and the alleged efficient division of responsibility among them (brief, pp. 4-5) are also contradicted by the record. See Brief for Petitioner, pp. 6-7, 46-48.

When respondents' counsel learned that two local districts had erroneously terminated the Medicaid benefits of two recipients, they filed their first motion to hold petitioner in contempt (*see* J.A. 257-259). Prior to receipt of that motion, petitioner had no reason to believe that any local district had not fully complied with her directive, and upon learning of respondents' allegations she immediately investigated and corrected the error (*see* J.A. 264, ¶¶ 4 and 5; J.A. 266). A telephone call to petitioner's counsel would have achieved the same result.

The second contempt motion was also filed unnecessarily. That motion, directed at petitioner's failure to send the notices required by paragraph 11 of the judgment, was made while a motion for a stay of that provision was pending in the Court of Appeals. The motion for contempt was denied when the stay was granted (*see* J.A. 286, 287).[25]

6. Timeliness of Petitioner's Objections.

Respondents contend that petitioner's objections to the fee award were not entered in the district court (Brief, pp. 42, 46-47). The district court stated otherwise (J.A. 354).[26]

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25. Respondents rely on their third contempt motion to justify the fees awarded counsel (Brief, p. 8). However, that motion was settled, and the attorney's fees connected with the motion were included in the settlement (*see* J.A. 303, ¶ 7). Thus, fees for the third contempt motion were not requested by respondents' fee motion, and are not included in the award before this Court.

26. Although petitioner did not argue in the district court that hourly rates should be based on costs, she argued that the rates sought were "exorbitant" (J.A. 354). The request for a cost-based hourly rate was raised in the Court of Appeals. Respondents have presented an exhaustive factual analysis of the alleged deficiencies of that approach (Brief, pp. 30-37), and do not claim any prejudice from our statement of the issue in general rather than specific terms. The issue is properly before the Court. *Hormel* v. *Helvering*, 312 U.S. 552 (1941).

Respondents also contend that petitioner failed to provide timely notice of her objections to the hours claimed (Brief, p. 42). The record does not support this assertion. In a Memorandum of Law in Opposition to Plaintiff's Motion for Attorney's Fees (dated December 23, 1980 and filed on December 29, 1980) petitioner identified duplications and excesses with specificity. On January 15, 1981, respondents filed supplemental affidavits in response to petitioner's claim of excesses (J.A. 344-350). Petitioner's Memorandum and respondents' supplemental affidavits were filed before oral argument on respondents' motion for an award of fees. At oral argument, the Court asked whether either party desired a hearing to offer testimony. Both declined.

Respondents' assertion that the State had the burden of establishing that the hours claimed were duplicative (Brief, p. 10), is not supported by any authorities. The applicant for a fee award has access to the relevant documentation and information. He must offer a convincing and detailed description of the division of labor before duplicative hours may be upheld as "reasonably expended." Cases may be "overstaffed" and "excessive" or "redundant" hours must be excluded. *Hensley, supra,* 103 S.Ct. pp. 1939-40. Respondents did not satisfy this standard. Their supplemental affidavits were vague, self-serving and conclusory—an after-thought developed in response to the State's Memorandum identifying excesses (Brief for Petitioner, pp. 42-48). They were not based on carefully prepared contemporaneous time records and were therefore inadequate.

Conclusion

The Order of the court below should be vacated and this case remanded for the determination of a reasonable attorney's fee award.

Dated: New York, N.Y.
December 30, 1983

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York

MELVYN R. LEVENTHAL
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Attorney General

PETER H. SCHIFF
Acting Attorney-in-Chief
Appeals and Opinions

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MARION R. BUCHBINDER
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Assistant Attorneys General
Of Counsel

APPENDIX

Appendix

STATE OF NEW YORK :
: ss.:
COUNTY OF ALBANY :

RICHARD E. WARNKE being duly sworn, deposes and says:

1. That I am the Administrative Finance Officer, New York State Department of Law, Albany, New York.

2. That all payroll records for employees of the New York State Department of Law are kept in my office.

3. That the actual salary of Judith A. Gordon, Assistant Attorney General, was as follows:

8/01/74 thru 6/25/75	$21,944
6/26/75 thru 3/31/76	$22,944
4/01/76 thru 3/31/77	$25,444
4/01/77 thru 9/28/77	$27,767
9/29/77 thru 3/31/78	$28,825
4/01/78 thru 7/31/78	$31,002

Exhibit A attached is the history and payroll card for Ms. Gordon for the period above. [Exhibit omitted]

4. That the actual salary of Robert S. Hammer, Assistant Attorney General, was as follows:

8/01/74 thru 6/25/75	$23,898
6/26/75 thru 3/31/76	$24,898
4/01/76 thru 7/31/76	$25,998

Exhibit B attached is the history and payroll card for Mr. Hammer for the period above. [Exhibit omitted]

5. The average annual salary for Judith Gordon is as follows:

8/01/74 thru 7/31/75	$22,027.33
8/01/75 thru 7/31/76	$23,777.33
8/01/76 thru 7/31/77	$26,218.33
8/01/77 thru 7/31/78	$29,374.33

6. The average annual salary for Robert Hammer is as follows:

8/01/74 thru 7/31/75	$23,976.00
8/01/75 thru 7/31/76	$25,264.66

7. The average annual salary was determined by taking the actual annual salary, computing the monthly rate, and then multiplying that amount by the number of months that the salary was in effect. This computation was made for each of the periods above.

8. The average hourly salary of Judith Gordon is as follows:

8/01/74 thru 7/31/75	$11.01
8/01/75 thru 7/31/76	$11.88
8/01/76 thru 7/31/77	$13.10
8/01/77 thru 7/31/78	$14.68

9. The average hourly salary of Robert Hammer is as follows:

8/01/74 thru 7/31/75	$11.98
8/01/75 thru 7/31/76	$12.63

10. The hourly rate was determined by multiplying the actual annual salary by .0005 pursuant to Audit and Con-

trol Payroll Manual Part II Chap. A Sec. 7a. which is Exhibit C attached.

11. The Division of the Budget in its Budget Policy and Reporting Manual has defined the standard work year for use by State agencies. For work weeks of 37½ hours, which is the standard work week for the Department of Law, there are 1643 hours in a standard work year. This standard work year reflects such factors as annual leave, sick leave, personal leave, and other authorized absences. Exhibit D is a copy of item D-230 of the Budget Policy and Reporting Manual.

12. Based on the standard work year as defined by the Budget Policy and Reporting Manual, the average hourly rate for Ms. Gordon is as follows:

8/01/74 thru 7/31/75	$13.40
8/01/75 thru 7/31/76	$14.47
8/01/76 thru 7/31/77	$15.95
8/01/77 thru 7/31/78	$17.87

13. Based on the standard work year as defined by the Budget Policy and Reporting Manual, the average hourly rate for Mr. Hammer is as follows:

8/01/74 thru 7/31/75	$14.59
8/01/75 thru 7/31/76	$15.37

For the purpose of billing the Port Authority, Metropolitan Transportation Authority, East Hundson Parkway Authority, and other independently funded authorities, this Department uses the hourly rates as determined by using the standard work year of 1643 hours.

15. This information has been submitted at the request of Judith A. Gordon based on the books and records of the Finance Office of the New York State Department of Law.

/s/ RICHARD E. WARNKE

RICHARD E. WARNKE

Sworn to before me this
2nd day of November, 1978.

/s/ JULIE M. TKACH

JULIE M. TKACH
NOTARY PUBLIC, State of New York
No. 4511240
Qualified in Albany County
Commission Expires March 30, 1979

Exhibit C to Warnke Affidavit

AUDIT CONTROL PAYROLL MANUAL

PART II CHAP. A SEC. 7

(FORM PR-75—PAGE 25)

EXTRA SERVICE RATE

a. Payment due for extra service is determined in the same manner as for overtime, *except that a straight hourly rate* is paid for any hours required to bring the total work week to the forty-hour basis. *The straight time extra service rate is determined as follows*:

Pay Basis

ANN Annual Salary X .0005 = Straight Hourly Rate

BLW Bi-weekly Rate X .0125 = Straight Hourly Rate

DLY Daily Rate X .125 = Straight Hourly Rate

One and one half times the hourly rate *can* be calculated using the following method instead of the overtime method.

Straight Hourly Rate X 1.5 = 1½ Hourly Rate

b. When the Extra Service Rate is fixed by the Director of the Budget the payment due is calculated at the hourly rate shown on the Budget Certificate.

INTERMITTENT INCONVENIENCE PAY

Payment due for intermittent inconvenience pay is calculated as follows:

Number of days worked which include intermittent inconvenience pay X $1.53 = Intermittent Inconvenience Pay Amount

HOLIDAY PAY

Holiday compensation is calculated at the rate of one-tenth of the employee's bi-weekly rate of compensation for each full day of holiday work and includes appropriate additional salary factors (Pre-shift briefing pay is *not* allowed). Holiday compensation for less than a full day is prorated.

For a full day

Bi-weekly Rate X .10 = Holiday Pay Amount

For a partial day

Work Day Rate X Decimal Equivalent = Holiday Pay Amount

LUMP SUM PAYMENT

Lump sum payment due for accrued credits is calculated as follows:

Work Day Rate X Number of days of accrued credits = Payment due

In calculating lump sum payments, no distinction is made for part-time employees.

Exhibit D to Warnke Affidavit

BUDGET POLICY AND REPORTING MANUAL

date 3/1/72 *subject* STANDARD WORK YEAR *item* D-230

page 1

1. *Purpose and Scope*

The Division of the Budget has promulgated a standard work year for use by State agencies:

a. to provide a uniform basis for determining their annual work program requirements and related staffing needs; and

b. to evaluate the use of existing staff, staffing patterns, and related production standards and reports.

2. *The Standard Work Year Defined*

The standard work year is defined as the number of days worked per year by the average State employee. Based on leave statistics provided by the Department of Civil Service, the standard reflects such factors as annual leave, sick leave, personal leave, and other authorized absences.

Using the most recent full-year data available, the standard work year is 219 days. For work weeks of 37½ and 40 hours, this is equivalent to 1,643 and 1,752 hours, respectively.

The Division of the Budget will revise the official standard work year as necessary to reflect current leave statistics and any changes in the amount of leave provided.

3. *Use of Other than Standard Work Year*

While the standard work year is applicable to the "average" State employee, it may not be appropriate for certain agencies or major parts thereof. For example, significant modifications to the standard work year could arise from the following circumstances:

a. unusual work-year situations, such as a large influx of seasonal workers, as exists in Office of Parks and Recreation, or a significant number of employees who work other than a full year, as in State University;

b. the development and presentation of valid leave statistics indicating a sginificant difference from Statewide averages; and

page 2

c. leave provisions for a majority of an agency's personnel which are substantially different from those for the bulk of State employees, such as in the Division of State Police.

In such cases, an agency should submit all pertinent documentation to its Chief Budget Examiner requesting use of a more appropriate work year. Agencies should not use other than the standard work year unless such advance approval is obtained from the Budget Division.

Amicus Brief

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Office-Supreme Court, U.S.
FILED
AUG 15 1983
ALEXANDER L. STEVAS,
CLERK

No. 81-1374

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1981

BARBARA BLUM, individually and in her capacity as Commissioner of the New York State Department of Social Services,

Petitioner,

v.

ELLEN STENSON, individually and on behalf of all other persons similarly situated,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMICI CURIAE STATES OF ALABAMA, ALASKA, ARIZONA, COLORADO, CONNECTICUT, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, LOUISIANA, MARYLAND, MICHIGAN, MINNESOTA, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA, WISCONSIN, WYOMING

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QUESTION PRESENTED FOR REVIEW

Whether 42 USC § 1988 authorizes a "bonus" award over and above the amount of attorneys fees determined by multiplying the reasonable number of hours expended by a reasonable hourly rate, and if so, whether the courts below abused their discretion in awarding a 50 percent "bonus" in this case?

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No. 81-1374

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1981

BARBARA BLUM, individually and in her capacity as Commissioner of the New York State Department of Social Services,

Petitioner,

v.

ELLEN STENSON, individually and on behalf of all other persons similarly situated,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMICI CURIAE STATES OF ALABAMA, ALASKA, ARIZONA, COLORADO, CONNECTICUT, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, LOUISIANA, MARYLAND, MICHIGAN, MINNESOTA, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA, WISCONSIN, WYOMING

INTEREST OF AMICI CURIAE STATES

By definition, the amici curiae joining in this brief engage constantly in "state action" which exposes them to suit under federal civil rights laws for the alleged breach of

all manner of duties arising under federal law. See, *Maine v. Thiboutot*, 448 U.S. 1 (1980). In recent years, these suits have almost invariably been accompanied by requests for awards of attorneys fees pursuant to the Civil Rights Attorneys Fees Award Act of 1976 (the Fees Act). The practice of using "multipliers" (or adding "bonuses") in calculating such awards has had (and continues to have) a profound and unsettling impact on each state joining herein.

While the history of the Fees Act reflects Congressional intent to vest broad discretion in the court to determine an appropriate award under all of the circumstances, no one could ever have anticipated that multipliers would be routinely applied, as they now are in many courts, or that resulting additional increments would rise to the level of outright windfall increases ranging from 50 percent to 200 percent (and, on occasion, higher) of the presumptively "reasonable" fee initially certified to the court. And yet these sorts of results now seem to obtain with alarming frequency in reported civil rights cases throughout the country.[1]

Attorneys fee awards determined using multipliers and bonuses do more than unfairly impact the public treasury. They add incentive to formally continue litigation of disputes which should be (and otherwise would be) settled informally. Obviously, the very last thing which the amici curiae states want is the needless continuation of litigation.

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[1]*See*, e.g., *Rajender v. University of Minnesota*, 546 F.Supp. 158 (D.C. Minn., 1982) (Multiplier of 3.0); *Wells v. Hutchinson*, 499 F.Supp. 174 (E.D. Tex., 1980) (Multiplier of 2.0); *Vecchione v. Wolgemuth*, 481 F.Supp. 776 (E.D. Pa., 1979) (Multiplier of 2.0). *See*, also *West v. Redman*, 530 F.Supp. 546 (D.C. Del., 1982) (Multiplier of 1.75); *Bolden v. Pennsylvania State Police*, 491 F.Supp 958 (E.D. Pa., 1980) (Multiplier of 1.5); *Population Services International v. Carey*, 476 F.Supp. 4 (SDNY, 1979) (Multiplier of 1.5). The impact of these and other reported decisions on the unreported fee litigation has been profound. In many parts of the country, fee applicants now routinely request multipliers in these same ranges in all civil rights cases.

QUESTION PRESENTED FOR REVIEW

Although several questions have been submitted by the State of New York in its Petition for Writ of Certiorari, this brief is limited to discussion of the first question there presented:

> Whether 42 USC § 1988 authorizes a "bonus" award over and above the amount of attorneys fees determined by multiplying the reasonable number of hours expended by a reasonable hourly rate, and if so, whether the courts below abused their discretion in awarding a 50 percent "bonus" in this case?

ARGUMENT

1. The Legislative History of the Fees Act Makes It Apparent that Congress Did Not Mean to Authorize the use of Multipliers or the Granting of Bonus Awards by Courts in Fees Act Cases.

The stated purpose of the Congress in enacting 42 U.S.C. § 1988 was merely to attract competent legal counsel to represent the majority of victims of civil rights violations, who it found could not otherwise afford to seek judicial redress. The Senate report stated the fundamental goal:

> "In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court."

S. Rep. No. 94-1011, 94th Cong., 2d Sess. (1976), at p. 2. The House report on a virtually identical counterpart bill (H.R. 15460) echoed the Senate's view:

> "The effective enforcement of Federal civil rights statutes depends largely on the efforts of private citizens. Although some agencies of the United States have civil rights responsibilities, their authority and resources are limited. In many instances where these

> laws are violated, it is necessary for the citizen to initiate court action to correct the illegality. Unless the judicial remedy is full and complete, it will remain a meaningless right. Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their case to the courts. In authorizing an award of reasonable attorney's fees [H.R. 15460] is designed to give such persons effective access to the judicial process where their grievances can be resolved according to law."

H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. (1976), at p. 1. Thus, both houses of Congress clearly intended that the fee award was merely to compensate legal counsel for services rendered in obtaining relief for civil rights violations.

In fact, Congress recognized potential for abuse. Although the reports of both houses affirmed a modest purpose to attract competent legal counsel, each specifically cautioned that the legislation was *not* intended to create a mechanism to make attorneys wealthy. The House report stated:

> "The application * * * will insure that reasonable fees are awarded to attract competent counsel in cases involving civil and constitutional rights, *while avoiding windfalls to attorneys.*"

H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. (1976), at p. 9 (emphasis added). And the Senate expressed identical concern:

> "It is intended that the amount of fees awarded under [the Fees Act] be governed by the same standards which prevail in other types of equally complex Federal litigation * * * These cases have resulted in fees which are adequate to attract competent counsel, *but which do not produce windfalls to attorneys.*"

S. Rep. No. 94-1011, 94th Cong., 2d Sess. (1976), at p. 6 (emphasis added, cases omitted).

Neither the House nor Senate report discussed adding any sort of bonus to the already "reasonable" sum certified to the court. Instead the history indicates that, in computing the fee award, courts are merely to insure that

"counsel for prevailing parties is paid, as is traditional with attorneys compensated by a fee-paying client, 'for all time reasonably expended on a matter.'" S. Rep. No. 94-1011, 94th Cong., 2d Sess. (1976), at p. 5 (case citation omitted).

With that in mind, it seems that the use of multipliers or, if one prefers, the practice of awarding of bonuses rather clearly runs counter to the intent of Congress. In citing to *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir., 1974) in both the Senate and House Reports, Congress simply could not have intended to authorize a result like that reached in this case, for as *Johnson* itself points out:

> "* * * courts must remember that they do not have a mandate * * * to make the prevailing counsel rich. Concomitantly, the [Fees Act] should not be implemented in a manner to make the private attorney general's position so lucrative as to ridicule the public attorney general. The statute was not passed for the benefit of attorneys but to enable litigants to obtain competent counsel worthy of a contest with the caliber of counsel available to their opposition and to fairly place the economical burden of * * * litigation * * *" (488 F.2d 714, 719).

2. Calculation by Reference to What the Client Otherwise Would Have Been Billed is the Proper Approach.

The standard approach to fee calculation by federal courts involves, as a first step, simple application of a reasonable hourly rate to the number of hours deemed to have been reasonably spent by the attorneys for the prevailing party. The base fees thus derived are then often enhanced through application of a multiplier (or, phrased differently, the addition of a bonus), the practice challenged by New York in this case.

In truth, though, calculation of the final award should more often involve significant *downward* adjustment of the base fees. As is apparent from the Senate Report, for example, the contemplated standard was the amount which it either already cost the plaintiff to litigate the case

or, hypothetically speaking, what it otherwise would have cost the plaintiff to vindicate the civil rights in question:

> "* * * Citizens must have the opportunity to recover *what it costs them* to vindicate [their civil rights] in court."

S. Rep. No. 94-1011, 94th Cong., 2d Sess. (1976), at p. 2.[2] Thus, instead of a bonus being added to base fees routinely calculated and proferred to the court by counsel for the prevailing party, some discount or reduction should probably be made in most of these cases to reflect the sort of judgmental process which attorneys normally engage in when they review their time records and prepare regular billing statements. This notion appears consistent with this Court's direction in *Hensley v. Eckerhardt* (Slip Opinion 81-1244; May 16, 1983), where it cautioned that attorneys should *exclude* from their petitions hours that were not reasonably expended, saying:

> "* * * Counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission. 'In the private sector, "billing judgment" is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority.' *Copeland* v. *Marshall*, 205 U.S. App. D.C. 390, 401, 641 F.2d 880, 891 (1980) (en banc) (emphasis in original)." (Slip Opinion at p. 9.)

This is, of course, a simple restatement of the common wisdom ultimately acquired by all practitioners of the law.[3]

---

[2] See also, H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. (1976) at p. 1, where the House Committee states that unless the civil rights plaintiffs' "* * * judicial remedy is full and complete, it will remain a meaningless right." The concept of "full and complete" does not imply enhancement beyond the costs actually incurred.

[3] On occasion, courts have taken this hypothetical fee-paying client consideration into account. See, *e.g.*, *Ramos v. Lamm*, 539 F.Supp. 730, 738 (D.C. Colo., 1982) where the District Court reasoned as follows:

> "* * * the hourly rate that an attorney charges his clients may reflect countless unbilled hours. If these are * * * billed when the opposing party is paying, then the hourly rate should be * * * lower."

Use of the basic "fee-paying client" standard for determining a "reasonable fee" fully accomplishes the purposes of the Fees Act. Competent counsel will continue to be attracted to represent civil rights plaintiffs to the same extent they are already attracted to represent paying clients generally.

3. Bonus Awards Add Incentive to Clog the Court System Unnecessarily with Civil Rights Litigation.

In general, apart from the "multiplier" or "bonus" issue, the Fees Act impacts the process of legal dispute resolution in ways which often seem unfair to public defendants, and which sometimes burden the courts unnecessarily. For one thing, the mere existence of the Fees Act (and other similar federal fee-shifting statutes) makes it more desirable to commence litigation in the first instance, rather than settle informally, since attorneys fees can only be awarded in the context of formal litigation. In a related vein, the Fees Act and other fee-shifting statutes make it advantageous to continue already-commenced litigation on meritorious claims rather than settle, since all time reasonably spent on such claims is normally compensated by the public defendant in the end. *Hensley v. Eckerhardt, supra.*

The practice of adding bonuses to awards of attorneys fees only exacerbates this situation, providing even less incentive for an attorney representing a civil rights plaintiff to settle the matter informally, whether before or after commencement of formal litigation. The result, of course, is a continuing unnecessary burden on an already-overburdened court system.

CONCLUSION

The practice challenged herein goes well beyond the stated congressional purpose of the Fees Act. Competent legal counsel will always be attracted to civil rights litigation by the simple promise of full compensation based on standard billing practices. Bonus awards represent precisely the sort of windfall which has been expressly disavowed by the Congress.

Respectfully submitted,

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Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF THE ALLIANCE FOR JUSTICE AS AMICUS CURIAE ON BEHALF OF ITS MEMBERS* SUPPORTING AFFIRMANCE

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NOW Legal Defense and Education Fund

National Wildlife Federation

National Women's Law Center

Native American Rights Fund

Natural Resources Defense Council

New York Lawyers for the Public Interest

Public Advocates, Inc.

Sierra Club Legal Defense Fund

Women's Law Project

Women's Legal Defense Fund

QUESTIONS PRESENTED

1. Whether the Civil Rights Attorney's Fees Act of 1976 requires that awards be based on prevailing market rates, regardless of counsel's affiliation or employer.

2. Whether upward adjustments are an integral element of a reasonable fee award under the Act in appropriate cases.

3. Whether Petitioner's requests for revisions in the Act should be addressed to Congress rather than to the Court.

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FOR THE SECOND CIRCUIT

BRIEF OF THE ALLIANCE FOR JUSTICE AS AMICUS CURIAE ON BEHALF OF ITS MEMBERS SUPPORTING AFFIRMANCE

INTEREST OF AMICI CURIAE

The Alliance for Justice is a national association of public interest law organizations. Its members, who join in the filing of this amici brief, are typical of the public interest law firms that may be affected by the Court's decision in this case.[1/]

1/ Members of the Alliance for Justice include: Business and Professional People for the Public Interest, the Center for Law and Social Policy, the Center for Law in the Public Interest, the Center for National Policy Review, the Center for Science in the Public Interest, Consumers Union, the Education Law Center, the Employment Law Center, the Environmental Defense Fund, Equal Rights Advocates, the Food Research and Action Center, Harmon & Weiss, the Institute for Public Representation, the Juvenile Law Center, the Mental Health Law Project, the NOW Legal Defense and Education Fund, the National Wildlife Federation, the National Women's Law Center, the Native American Rights Fund, the Natural Resources Defense Council, New York Lawyers for the Public Interest, Public Advocates, Inc., the Sierra Club Legal Defense Fund, the Women's Law Project, and the Women's Legal Defense Fund.

These public interest law firms provide legal representation to a wide variety of clients, including Black and Native Americans, poor persons, consumers, women, children, and persons institutionalized in mental health facilities. Many of the clients now served by these public interest attorneys are members of groups that have traditionally lacked the resources to obtain representation to vindicate their legal rights.

During the past fifteen years, these public interest law firms have been litigating a number of important cases, safeguarding their clients' rights and in some instances significantly advancing the law. Often these advances have been won in education cases,[2/] in challenges

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2/ See, e.g., Grymes v. Madden, 672 F.2d 321 (3d Cir. 1982) (holding that a state agency may not withdraw funding for handicapped [footnote continued]

to discriminatory employment practices,[3] and in litigation on housing and relocation issues.[4] Other key litigation

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2/ [continued] student's tuition during pendency of placement proceedings); Larry P. v. Riles, 495 F. Supp. 926 (N.D. Cal. 1979) (invalidating use of standardized IQ tests as a placement mechanism for Black children who are mentally retarded); Pennsylvania Association for Retarded Children v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971), modified, 343 F. Supp. 279 (E.D. Pa. 1972) (establishing educational rights of all mildly and moderately mentally retarded students in Philadelphia).

3/ See, e.g., McKenzie v. Sawyer, 684 F.2d 62 (D.C. Cir. 1982) (one of the earliest Title VII cases in which a district court determined that a federal government agency had engaged in class-wide racial discrimination); Officers for Justice v. Civil Service Commission, 371 F. Supp. 1328 (N.D. Cal. 1973) (ordering preliminary relief to prevent racial discrimination in San Francisco police force); 395 F. Supp. 378 (N.D. Cal. 1975) (striking down use of physical agility test at entry level); 688 F.2d 615 (9th Cir. 1982) (approving settlement).

4/ See, e.g., Hills v. Gautreaux, 425 U.S. 284 (1976) (holding metropolitan area relief permissible in case of deliberate racial discrimination in housing); La Raza Unida of Southern Alameda County v. Volpe, 337 F. Supp. 221 (N.D. Cal. 1971) (requiring state highway commission to comply with statutory provisions for

[footnote continued]

efforts have involved the rights of persons institutionalized in mental health facilities,[5] the rights of consumers,[6] and the constitutionality vel non of the legislative veto,[7] to name just a

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4/ [continued] relocation assistance and environmental protection before highway construction), aff'd, 488 F.2d 559 (9th Cir. 1973), cert. denied sub. nom. California Highway Commission v. La Raza Unida of Southern Alameda County, 417 U.S. 968 (1974).

5/ See, e.g., Addington v. Texas, 441 U.S. 418 (1979) (establishing a "clear and convincing evidence" standard of proof for the state in involuntary commitment proceedings); O'Connor v. Donaldson, 422 U.S. 563 (1975) (recognizing the liberty interests of persons committed to mental institutions via civil procedures, and holding that such persons cannot be detained involuntarily with no treatment unless shown to be a danger to themselves or others).

6/ See, e.g., Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980) (holding that Virginia court could be sued, when acting in its enforcement role, by consumers seeking to establish their rights under the First Amendment to publish a lawyer directory).

7/ See, e.g., INS v. Chadha, 103 S. Ct. 2764 (1983) (involuntary legislative veto); Consumers Union of United States, Inc. v. FTC, 691 F.2d 575 (D.C. Cir. 1982), aff'd sub nom., United States Senate v. FTC, 103 S. Ct. 3556 (1983) (same).

few examples.[8/]

All the nonprofit, public interest law firms in the Alliance have received and continue to receive many more requests for legal assistance than they have the resources to provide. Members of the Alliance have been able to refer some persons seeking assistance to appropriate counsel in private practice who may be willing to provide representation on a pro bono publico or contingent fee basis. However, public interest groups have found that when the facts of a prospective client's case will require detailed investigation or the law is unsettled, private attorneys are often

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8/ It is important to note that members of the Alliance and other similar public interest law firms often pursue non-litigation strategies, such as legislative and administrative advocacy, to protect their clients' rights. These kinds of advocacy, while effective and efficient, are not remunerated by attorney's fees.

reluctant to take the case. Hence, the public interest organizations frequently must rely on their own staff attorneys to handle such cases.

Alliance members are funded in various ways, including membership dues, foundation grants, charitable donations, and, for a small number of the Alliance organizations, some public monies. When a public interest organization that is a member of the Alliance receives an award of attorney's fees pursuant to Section 1988, the award monies are channelled directly into continuing, improving, and if possible increasing the legal representation the organization offers.9/

9/ It is important to note that although the availability of attorney's fee awards has been a significant factor in enabling some public interest groups to undertake and maintain certain litigation, it has neither "subsidized" the existence of these groups nor guaranteed their survival (notwithstanding the allegations of petitioner and supporting amici). For the [footnote continued]

Hence, because they use court-awarded fee monies to assist in funding services to persons with meritorious legal claims, Alliance members have an interest in the application of the Civil Rights Attorney's Fee Award Act of 1976. Currently, that Act, as the courts of appeal and the district courts have interpreted and applied it, has contributed to enabling Alliance members and other similar organizations to provide representation for the vindication of constitutional and federal statutory rights.

If, however, the modifications urged by petitioner New York State (and several supporting amici) in the interpretation and application of the 1976 Fee Award Act

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9/ [continued] majority of Alliance members, monies received from attorney's fee awards are limited, and only comprise one to twelve percent of the group's budget.

are adopted by the Supreme Court, fee awards to many of the member organizations in the Alliance (and other similar groups) will be sharply reduced. This may well affect the ability of many of these groups to continue, improve, and where appropriate increase their efforts to provide legal representation.

For these reasons, the Alliance for Justice and each of its members join in submitting this brief in support of respondent Ellen Stenson and her counsel at the Legal Aid Society of New York.

INTRODUCTION AND SUMMARY OF ARGUMENT

In its grant of certiorari in this case, the Supreme Court indicated it would hear two important attorney's fee award issues: 1) whether all attorneys for prevailing plaintiffs should be compensated in a like manner and amount for the value of their services on the basis of

prevailing hourly rates, or whether public interest attorneys should be compensated less fully because their services allegedly "cost" less, and 2) whether the statute authorizes the upward adjustment of a fee award (sometimes referred to as a "multiplier" or "bonus") in appropriate cases.

The legislative history of the Civil Rights Attorney's Fee Award Act addresses both of these questions fully and unambiguously. It instructs the courts to compensate all attorneys for prevailing plaintiffs, regardless of their affiliation or employer, by the same standards which prevail in other types of equally complex federal litigation. To do otherwise, that is, to establish differing criteria and levels of compensation, would ignore the value of services rendered and unfairly relegate skilled practitioners in the public interest

sector of the bar to "second-class" status. Even more importantly, it would establish a set of "second-class" plaintiffs: When defendants expected plaintiffs to be represented by public interest attorneys, their incentives to obey the law and court orders would be much weaker than in those instances where they expected plaintiffs to be represented by private counsel.

The legislative history of the Fees Act also instructs the courts to make an upward adjustment in attorney's fee awards when certain factors are present. Congress recognized, as had the American Bar Association in its Code of Professional Responsibility and several courts considering these issues prior to the enactment of the Fees Act, that such an award adjustment might compensate, inter alia, for the results achieved in a case, the contingent nature of civil rights

litigation, and the inevitable delay counsel would face in recovering a fee.

The briefs of petitioner and its supporting amici inaccurately portray the legislative history of the Fees Act, and seek to ascribe to the term "windfall" a meaning wholly inconsistent with Congress' use of the term. There is no windfall produced by the award of a fee commensurate with the value of services a public interest practitioner renders. Indeed, in some cases it may be particularly appropriate for a court to make an upward adjustment in the fee awarded to public interest attorneys. Public interest lawyers often handle complex litigation with unsettled legal issues, achieve excellent results, and experience lengthy delays in recovering a fee.

In asking this Court to "construe" the civil rights fee statute to permit

lesser fees to public interest attorneys, petitioner and its supporting amici are simply renewing -- albeit in the wrong forum -- requests which they have already addressed unsuccessfully to Congress. Congress rejected the notion of lesser fee awards to legal services and public interest attorneys in 1976. Moreover, in 1981 and 1982 Congress was urged, but declined, to adopt precisely the kinds of modifications in the statute that petitioners now seek from this Court. The record of Congressional hearings on the issue reveals that petitioners, inter alia, asked Congress for these amendments, but failed to document either the need for change or the efficacy and equity of their proposed solutions. Under these circumstances, the Court should decline their request for judicial imposition of modifications in the fee award statute.

ARGUMENT

I. THE 1976 ACT REQUIRES AN AWARD OF ATTORNEY'S FEES BASED ON PREVAILING MARKET RATES, REGARDLESS OF THE IDENTITY OF COUNSEL.

A. The Legislative History of the Attorney's Fees Act Demonstrates that Congress Did Not Intend the Courts to Differentiate Between an Award of Fees to Private Practitioners and an Award to Public Interest Attorneys.

The Civil Rights Attorney's Fees Award Act provides for the award of "reasonable attorney's fees" to a prevailing litigant in civil rights cases.[10/] 42 U.S.C. §1988 (1981) [hereinafter cited as the Fees Act or Section 1988]. The legislative history of the Fees Act demonstrates Congress' intent with regard to the meaning of "reasonable fees." The

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10/ Section 1988 provides for fee awards to prevailing plaintiffs in litigation of claims pursuant to the following statutes: 42 U.S.C. §§1981-1983, 1985, 1986; 20 U.S.C. §§1681, et seq.; 26 U.S.C. §§1, et seq.; 42 U.S.C. §§2000d, et seq.

Senate Report states that the amount of fees awarded under Section 1988 is to be "governed by the same standards which prevail in other types of equally complex litigation, such as antitrust cases...." S. Rep. No. 94-1011, 94th Cong., 2d Sess. 6, reprinted in 1976 U.S. Code Cong. & Ad. News 5908, 5913 [hereinafter cited as the Senate Report].

The report refers to Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974), a case that set forth twelve factors for consideration in setting a reasonable fee.[11/] Senate Report,

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11/ These factors are: (1) time and labor required, (2) novelty and difficulty of questions, (3) skill requisite to perform the legal service properly, (4) preclusion of other employment by the attorney due to acceptance of the case, (5) customary fee, (6) contingency of fee, (7) time limitations imposed by the client or circumstances, (8) amount involved and results obtained, (9) experience, reputation, and ability of attorneys, (10) "undesirability" of case, (11) nature and length of professional relationship with client, and (12) awards in similar cases.

supra p. 14, at 5. The report stressed that these Johnson factors were correctly applied in three selected opinions: Swann v. Charlotte-Mecklenburg Board of Education, 66 F.R.D. 483 (W.D.N.C. 1975); Stanford Daily v. Zurcher, 64 F.R.D. 680 (N.D. Cal. 1974), aff'd, 550 F.2d 464 (1977); and Davis v. County of Los Angeles, 8 E.P.D. ¶ 9444 (C.D. Cal. 1974). Senate Report, supra p. 14, at 5. In each of these three cases, the court awarded attorney's fees to public interest attorneys commensurate with the fees it would award to private firms for the same quality of representation.12/

12/ In Swann, plaintiff's lawyers were from NAACP Legal Defense Fund. The district court noted that in "other civil rights cases where counsel fees [had] been awarded, the courts [had] held that reasonable fees should be granted." The court, following those cases, held that "reasonable fees should be granted regardless of whether the individual plaintiffs were obligated to pay any fees and regardless of whether the attorneys were salaried employees of a legal aid

[footnote continued]

The Senate Committee's reliance on Swann, Stanford Daily, and Davis to provide examples of its intent in Section 1988 illustrates the Committee's intent that courts award attorney's fees on an equal basis to private practitioners and public interest attorneys. Noting that the fee awards in these cases did not produce windfalls to plaintiffs' lawyers, the drafters of the Senate Report stated that all attorneys for prevailing parties

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12/ [continued] agency." 66 F.R.D. at 486. Similarly, in Stanford Daily, the lawyers were private attorneys acting pro bono publico. Here, the district court stressed that it "must avoid ... decreasing reasonable fees because the attorneys conducted the litigation more as an act pro bono publico than as an act of securing a large monetary return." 64 F.R.D. at 681. Finally, in Davis, two lawyers were employed by the Center for Law in the Public Interest. The court reasoned that in "determining the amount of fees to be awarded, it is not legally relevant that plaintiff's counsel are employed by ... a privately funded non-profit public interest law firm." 8 E.P.D. at 5048-49.

should be awarded fees in the same manner "as is traditional with attorneys compensated by a fee-paying client."[13/] Id.

13/ In addition, "[t]he language of the House Report, and the cases relied on, leave no doubt that Congress intended public interest attorneys to receive full awards of attorney's fees that are awarded to private counsel." R. Larson, Federal Court Awards of Attorney's Fees 101. The House report cites, for example, Fairley v. Patterson, 493 F.2d 598 (5th Cir. 1979), as illustrating an appropriate award of attorney's fees. H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 8, n. 16 (1976) [hereinafter cited as House Report]. In Fairley the Fifth Circuit awarded fees to the Lawyers Committee for Civil Rights, a non-profit organization. 493 F.2d at 606-07. The court held that a proper standard for determining reasonable attorney's fees for a non-profit organization was not found in "an obligation to pay attorney's fees. Rather, what -- and all -- that [was] required [was] the existence of a relationship of attorney and client, a status which exists wholly independent of compensation...." 493 F.2d at 607 (quoting Miller v. Amusement Enterprises, Inc., 426 F.2d 534, 538-39 (5th Cir. 1970)) (emphasis added).

B. It Would Be Inequitable to Award Public Interest Attorneys Lower Fees for the Same Quality of Legal Representation.

In addition to the express legislative history, equitable considerations proscribe the imposition of a standard that awards public interest attorneys lesser fees than private practitioners for the same work. As one commentator has pointed out:

> [I]t would be fundamentally unfair to award fees ... based upon full market rates to attorneys who ordinarily seek to maximize their economic return -- a result which is essential to enlist their services based upon economic self-interest -- while the same time awarding something less than full market rate to attorneys that forego some of their earning capacity by representing clients who cannot afford representation. To do so is penalizing those attorneys for their public spiritedness.

Berger, Court-Awarded Attorney Fees: What Is "Reasonable"?, 126 U. Pa. L. Rev. 281,

323 (1977).

Instead, as the courts have consistently held, the proper inquiry in any fees computation is the value of the legal representation. The attorney's demonstrated skill, particular experience, reputation and ability are among the factors comprising the value of representation. See, e.g., Palmigiano v. Garrahy, 616 F.2d 598, 601 (1st Cir. 1980); Dennis v. Chang, 611 F.2d 1302, 1309 (9th Cir. 1980). In public interest litigation, where plaintiffs' attorneys often do not have regular billing rates, courts look to the billing rates of private counsel "of comparable experience in cases of comparable complexity" to determine the value of their services. Dennis v. Chang, 611 F.2d at 1302, 1309; see also Northcross v. Board of Education of Memphis, 611 F.2d 624, 638 (6th Cir. 1979), cert. denied, 447 U.S. 911 (1980);

R. Larson, Federal Court Awards of Attorney's Fees 197-209 (1980).

There is no dispute about the value of services rendered in this case. Respondents' attorneys represented their clients in a zealous and skilled manner. The district court, in reviewing their work, emphasized that "the legal issues involved were both novel and complex, involving a complicated interaction between state and federal law and a contract between the state and federal governments," and that "[t]he quality of work performed by counsel throughout the case was high." JA 352-53.

Had respondent's lawyers been employed by a private firm when they provided this representation, neither their clients nor their adversaries would have contested the district court's assessment of the value of their services. Similarly, had these attorneys chosen to

associate as co-counsel a private practitioner of comparable experience and skill, there would be no question about the attorney's right to fees computed at a prevailing market rate. Indeed, the circuit courts applying the Fees Act have consistently recognized that public interest attorneys are not to receive lower fees than their similarly experienced colleagues in private practice simply because of the public interest nature of their work or because of their lower salaries. See, e.g., Palmigiano v. Garrahy, 616 F.2d 598, 601-02 (1st Cir. 1980); Watkins v. Mobile Housing Board, 632 F.2d 565 (5th Cir. 1980); Mary and Crystal v. Ramsden, 635 F.2d 590 (7th Cir. 1980); Dennis v. Chang, 611 F.2d 1302 (9th Cir. 1980); Northcross v. Board of Education of Memphis, 611 F.2d 624 (6th Cir. 1979), cert. denied,

447 U.S. 911 (1980).[14/]

C. A Dual Standard for Fee Awards Would Reduce Settlement and Compliance Incentives.

In Hensley v. Eckerhart, Justice Brennan, with the concurrence of three Justices, stressed that attorneys for legal services should be paid as if they were in private practice to avoid windfalls to defendants under Section 1988. 103 S. Ct. 1933, 1946 n.6 (1983) (Brennan, J., concurring in part and dissenting in part). Indeed, a defendant who would be liable for lower attorney's fees simply because opposing plaintiffs could not obtain private

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14/ The inequities, for both civil rights attorneys and clients, of establishing a dual, cost-based system of attorney's fees are further described in the brief for the California Coalition of Welfare Rights Organizations as amicus curiae, filed in support of affirmance.

representation would enjoy a financial windfall compared to other defendants who would be required to pay full attorney's fees in comparable cases. As one district court emphasized: "[T]here is no conceivable reason to allow a wrongdoer to gain a windfall solely because he is brought to bar by an attorney whose salary is paid by a public interest law organization." Gunther v. Iowa State Reformatory, 466 F. Supp. 367, 369 (N.D. Iowa 1979). Indeed, there exists little argument for condoning a disparity of awards among defendants in equally complex cases. As the Eighth Circuit stressed: "[A] defendant sued by plaintiff retaining [non-profit legal services] should not be benefitted by the fortuity that the plaintiff could not afford private counsel." Oldham v. Ehrlich, 617 F.2d 163, 168-69 (8th Cir. 1980).

If lower fee awards are made to public interest attorneys, their clients will be less likely to secure their civil rights under the law. There are three aspects to this problem: Defendants will have lesser incentives to refrain from illegal conduct, lesser incentives to settle, and lesser incentives to comply with court orders.

First, prospective defendants will have lesser incentives to respond seriously when notified by public interest attorneys that their clients' civil rights are being violated. For example, under 42 U.S.C. §1983, it is illegal for state employers to discriminate racially against their employees. Because a violation of 42 U.S.C. §1983 threatens employers with the expense of paying attorney's fees under Section 1988, employers have a significant financial incentive to comply with the law

and stop racial discrimination against employees. In fact, the legislative history indicates that Congress intended to secure compliance with civil rights laws via Section 1988 fee awards.[15/] However, if courts employ a dual attorney's fees standard that enables state employers to pay lower attorney's fees simply because the employees proving racial discrimination have been represented by public interest attorneys, the employer will have a lesser financial incentive to stop racial discrimination against those employees. In sum, when one "focus [of §1988] is ... on deterring misconduct by imposing a monetary burden upon the wrongdoer, a legal aid

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15/ For example, the drafters of the Senate Report emphasized: "We find that the effects of such fee awards are ancillary and incident to securing compliance with these laws, and that fee awards are an integral part of the remedies necessary to obtain such compliance." Senate Report, supra p. 14, at 4.

organization merits an attorney's fee fully as much as does the private attorney." Oldham v. Ehrlich, 617 F.2d at 169.

Second, litigation will be more protracted if lower fees are adopted for public interest attorneys. Defendants in these cases will have less of an incentive to settle bona fide claims promptly.[16/] As the Court of Appeals for the District of Columbia Circuit has observed in rejecting arguments for a dual fee standard:

> [W]here a public interest law firm serves as plaintiff's counsel (a law firm that will not obtain the full value of its services from the losing defendant), the defendant will be subject to a lesser incentive to settle a suit without litigation than would be the case if a high-priced private firm undertook plaintiff's representation.

16/ The Senate Report explicitly encouraged settlement as an alternative by which plaintiffs could vindicate their rights. Senate Report, supra p. 14, at 4.

Copeland v. Marshall, 641 F.2d 880, 899 (D.C. Cir. 1980) (en banc); see also Dennis v. Chang, 611 F.2d at 1309. The smaller an award of attorney's fees to public interest attorneys becomes in relation to an award to private firms, the less leverage their clients will have in obtaining settlement of meritorious claims. See Note, Awards of Attorney's Fees to Legal Aid Offices, 87 Harv. L. Rev. 411, 417-18 (1973).

Finally, after a judicial order has been entered, defendants will have less incentive to comply with the decree because contumacious conduct will cost them less to defend where plaintiffs are represented by public interest attorneys. For example, in Vecchione v. Wohlgemuth, the governmental defendant failed to obey a 1974 injunction and 1975 consent decree prohibiting the state, inter alia, from summarily seizing and controlling property

belonging to institutionalized persons without a hearing or notice. 481 F. Supp. 776, 777, 797 (1979). The defendants attempted to argue against a fee award compensating plaintiff's counsel for his efforts to compel compliance. However, the district court characterized the defendants' failure to comply as "vexatious" and "obdurate," and concluded that the award of attorney's fees would avoid delaying tactics and, in turn, "encourage persistence in response." Id. at 797.

The Vecchione case demonstrates the important role that attorney's fees play in assuring compliance with court orders and consent decrees. As the court opinion stated, the defendant will be encouraged to obey court orders and consent decrees when he knows he potentially must pay the cost of the plaintiff's responses to any contumacious

conduct. However, in cases where public interest lawyers secure court orders or negotiate consent decrees, defendants will have a lesser economic incentive to comply if they are not liable for full attorney's fees. This lesser incentive to comply indeed threatens the effectiveness of Section 1988. As the Eighth Circuit properly stressed: "The basic purpose of Section 1988 -- to encourage enforcement and observance of civil rights -- permits no distinction between private attorneys and legal aid organizations." Oldham v. Ehrlich, 617 F.2d at 168.

II. THE 1976 ACT REQUIRES THE UPWARD ADJUSTMENT OF FEE AWARDS IN APPROPRIATE CASES.

A. Upward Adjustments Are Recognized as an Integral Element of a Reasonable Fee.

In enacting the Fees Act, Congress fully and unambiguously expressed its

approval of upward adjustments as an integral step in fashioning a reasonable fee under certain circumstances. Congress emphasized the appropriateness of upward adjustments by: 1) requiring that the standards governing other complex federal litigation (such as antitrust cases which often involve upward adjustments) also govern Section 1988 fee awards; 2) expressly approving the use of twelve factors for setting and reviewing fee awards, including several factors which require upward adjustment of the market rate fee; and 3) highlighting three cases as models for applying these factors, two of which included upward adjustment of fees. Moreover, the legislative history shows clearly that these fee guidelines apply uniformly to all attorneys, requiring the same adjustments for public interest attorneys as for private practitioners.

Both the Senate and the House reports point to Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974), as illustrative of the appropriate method to be used in determining a reasonable fee in Section 1988 cases. Senate Report, supra p. 14, at 5; House Report, supra p. 17 n.13, at 7. The factors set forth in Johnson are derived from the American Bar Association's Code of Professional Responsibility, Disciplinary Rule 2-106, Fees for Legal Services. This ABA Code provision recognizes and approves the longstanding practice among attorneys of charging upward adjustments in cases where the fee is contingent, the questions involved are novel and difficult, the skill required to perform the legal service properly is special or the ability of the lawyer performing the service is exceptional. Moreover, the Code specifically endorses "results

obtained" as a factor affecting the reasonableness of the fee.

Hence, the Johnson decision also emphasized that "hours claimed or spent on a case should not be the sole basis for determining a fee" and set forth the twelve factors to be considered in setting a fee award, including the novelty of the questions presented, the contingency of the fee, and the results obtained on the merits. 488 F.2d at 714. See supra note 11 for a list of the other nine factors. The Johnson ruling stressed that courts should look beyond simple measures of damages and consider in addition the decision's effect on the law and the extent to which the relief granted would affect a large class of people. Id. at 718.

The fact that Congress not only provided for upward adjustments of fees but also clearly intended that public

interest attorneys receive such adjustments is underscored in the legislative history. The Senate Report endorses three specific cases to serve as models in applying the Johnson factors to arrive at a reasonable fee. Senate Report, supra p. 14, at 6.[17] Two of these model cases included an upward adjustment of fees.[18] Moreover, one of these cases

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17/ For a fuller discussion of this legislative history, see the briefs of respondents and of the NAACP Legal Defense and Educational Fund, Inc., et al., as amici curiae in support of affirmance.

18/ Davis v. County of Los Angeles, 8 E.P.D. ¶ 9444; Stanford Daily v. Zurcher, 64 F.R.D. 680. In Davis, the court determined that the fee for the public interest law firm should be increased by an approximate twenty percent above the hours-times-rate sum. The Stanford Daily court weighed the contingent nature of payment for the lawyers pro bono publico efforts along with the attorneys' excellent presentation of novel issues and constitutional principles to arrive at a thirty percent upward adjustment of the base fee. 64 F.R.D. at 686.

selected by Congress involved an increased fee award to a public interest law firm based on the difficulty of the case and the results obtained for the plaintiffs and the represented class. Davis v. County of Los Angeles, 8 E.P.D. ¶ 9444. In view of such explicit guidance from Congress, the Fees Act clearly requires upward adjustment of fees in appropriate cases including those cases litigated by public interest attorneys.

This extensive legislative history makes it difficult to find any merit in the claim of petitioner and supporting amici that upward adjustment of a fee produces a "windfall" to plaintiffs' attorneys. Indeed, after citing the three illustrative cases for determining fees, two of which involved upward adjustments, Congress asserted: "These cases have resulted in fees which are adequate to attract competent counsel but which do not

produce windfalls to attorneys."
Senate Report, supra p. 14, at 6 (emphasis added).[19/]

This Court has recently acknowledged this legislative history, emphasizing that the calculation of the hourly rate is only the first step in determining a reasonable fee. In Hensley v. Eckerhart, 103 S. Ct. at 1940, a case litigated by legal services attorneys, Justice Powell explained: "There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the 'results obtained.'" Id. The Hensley decision

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19/ Similarly without merit is the argument made by the Solicitor General that upward adjustments compensate counsel for unsuccessful litigation. Congress, the courts, and the ABA have construed such adjustments as just compensation in a case exhibiting the requisite factors. It is irrelevant to the determination of proper compensation what, if any, other cases plaintiff's counsel may have litigated and lost.

stressed that courts should focus on the significance of the overall relief obtained by the plaintiff and recognized that "in some cases of exceptional success an enhanced award may be justified." Id. (emphasis added).

Justice Brennan's separate opinion (concurring in part and dissenting in part) stressed that the significance of the results obtained cannot be measured in terms of dollars and cents, but must involve a regard for the nature of the rights obtained and the effect of plaintiff's relief on persons similarly situated. Id. at 1948-49. A fully compensatory fee should also take into account both delays in payment and pre-litigation likelihood that the claims which did in fact prevail would prevail." Id. at 1947-48.

The Court has thus recognized the types of factors which require an increase

in some cases. Although compensable hours and market value form the core of fee computation, this Court and virtually all courts of appeal have recognized the requirement to consider factors such as results obtained in determining a reasonable fee under Section 1988. See, e.g., Jones v. Diamond, 636 F.2d 1364, 1382 (5th Cir. 1981) (en banc); Cohen v. West Haven Board of Police Commissioners, 638 F.2d 496, 505 (2nd Cir. 1980).20/

B. Upward Adjustments May Be Particularly Appropriate in Cases Handled by Public Interest Attorneys.

Upward adjustments may be particularly appropriate in cases litigated by public interest attorneys because cases in which these attorneys provide

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20/ The brief of the NAACP Legal Defense and Educational Fund, Inc., et al., as amici curiae, provides a complete listing of relevant decisions by the courts of appeal.

representation are often among the most novel, protracted and complex. This circumstance results from the fact that public interest attorneys, whose resources are limited, must often attempt to refer potential clients to private practitioners. The private practitioners they contact are more willing to accept cases in which the law is well-settled and the facts are clear.

Hence, public interest attorneys are more likely to litigate themselves the cases in which the law is unsettled, and the facts require detailed and lengthy investigation -- cases in which the recovery of a fee is least certain. Also, public interest attorneys may be asked, because of their experience and expertise in certain areas of law, to handle or assist with difficult cases. For example, in Louisville Black Police Officers v. City of Louisville, 511 F. Supp. 825

(W.D. Ky. 1979) (decision on merits), 700 F.2d 268 (6th Cir. 1983) (affirmance of fee award), the plaintiffs' attorneys challenging racial discrimination in the city's police department asked attorneys at the NAACP Legal Defense Fund to assist them. 700 F.2d at 271. After approximately six years of thorough litigation and a five-week trial, the district court determined that the city had a history of racial discrimination and segregation in its police employment practices, and entered a preliminary injunction with respect to the hiring of Black police officers by the defendants. 511 F. Supp. 825. Approximately nine months later, the parties signed a consent decree which substantially incorporated the remedies set out in the court's preliminary injunction. 700 F.2d at 271. In affirming an award of attorney's fees which included an upward adjustment of the base fee by

a thirty-three percent contingency factor, the court of appeals noted that the facts in the case were strongly disputed, and the applicable law (on employment testing, proof of intentional discrimination, the use of statistical evidence, the determination of a relevant labor market and the permissibility of race-conscious remedies) had been developing throughout the pendency of the case. Id. at 279-80.21/

Contentions that upward adjustments are windfalls when awarded in Section 1988 cases to public interest attorneys ignore the purposes of such adjustments. Just as the private attorney litigating a potential Section 1988 case foregoes the opportunity to devote that time to

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21/ For other examples of complex and protracted litigation conducted by public interest attorneys, see the cases cited supra pp. 2-4 nn. 2-7.

fee-paying clients or more certain claims, the public interest firm committing some of its limited attorney resources to a Section 1988 case foregoes the opportunity to devote that time to other eligible clients and other meritorious and more certain claims. The award monies compensate for these "opportunity costs."

Award monies may play an important role in budgetary planning by public interest organizations. These funds may be used to pay salaries of existing staff, conserved for future months or years when cutbacks in other funding sources may threaten the continuity of services to existing clients, or spent to add an additional attorney to staff. Hence, such monies are used to provide legal services to persons who otherwise might not be able to obtain them.22/

22/ One commentator has pointed out that a [footnote continued]

Therefore, not only would it be contrary to the legislative and judicial interpretation of the Act to allow upward adjustments to firms which operate for profit while denying them to public interest law organizations on the basis of petitioner's "windfall" arguments, it would be highly inequitable to do so.

III. PETITIONER'S REQUESTS FOR REVISION OF THE FACTORS UPON WHICH SECTION 1988 FEE AWARDS ARE BASED SHOULD BE ADDRESSED TO CONGRESS, NOT TO THE SUPREME COURT.

In their briefs, the petitioners and their supporting amici ignore the principle that where Congress' intent in enacting a statute is clearly expressed,

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22/ [continued] market value fee award to a non-profit law firm simply enables legal resources to be made more widely available to others. Further, he noted, such a fee award provides lawyers who are willing to take on unpopular causes and carry the cost of protracted litigation indispensable to the full protection of substantive rights. Berger, Court Awarded Attorney's Fees: What Is "Reasonable"?, 126 U. Pa. L. Rev. at 323.

the Court should enforce the statute in a manner consistent with that intent and reject requests for judicial revision. See, e.g., United States v. Rutherford, 442 U.S. 544, 551-52, 554 n.10 (1979). Here, where Congress' intent was set forth unambigously, requests for revision should be addressed to Congress.

In fact, in 1981 and 1982 Senate hearings, several of the state attorneys general urged members of Congress -- albeit unsuccessfully -- to make precisely the kinds of modifications in the Fees Act they now seek from the Court. See Attorney's Fees Awards: Hearings on S.585 (and on Amendments to Be Proposed by Senator Orrin G. Hatch) Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 97th Cong., 2d Sess. (Comm. Print 1982) [hereinafter cited as 1982 Hearings]; see also Municipal Liability Under 42 U.S.C. 1983:

Hearings on S.584, S.585, and S.990 Before the Subcommittee on the Constitution of the Committee on the Judiciary, 97th Cong., 1st Sess. (Comm. Print 1981) [hereinafter cited as 1981 Hearings]. Officials of the National Association of Attorneys General, including several state attorneys general, urged, inter alia, that Congress should amend Section 1988 by: 1) eliminating or reducing fee awards to public interest attorneys practicing with non-profit organizations and to legal services organizations receiving public funding (see 1981 Hearings, supra p. 43, at 542, 548, 575-76, and 1982 Hearings, supra p. 43, at 118, 121, 124); and by 2) eliminating upward adjustments (or "multipliers") as a factor in appropriate cases for setting fees (see 1981 Hearings, supra p. 43, at 575-76, and 1982 Hearings, supra p. 43, at 122-23). Members of the

National Association of Attorneys General (NAAG) were joined in their efforts to obtain these amendments by members of the National Institute of Municipal Law Officers (NIMLO).[23/]

Several aspects of these 1981 and 1982 Senate subcommittee proceedings merit attention. First, as noted above, the state attorneys general urged exactly the same fee statute modifications in Congress which they now urge in their amici briefs as appropriate for judicial action.[24/] Second, in urging members of

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23/ Officers testifying on behalf of NIMLO also urged both the elimination or reduction of fee awards to legal services and public interest attorneys (see 1981 Hearings, supra p. 43, at 102, 105, and 1982 Hearings, supra p. 43, at 100-101), and the elimination of upward adjustments (or "multipliers") (see 1981 Hearings, supra p. 43, at 104, and 1982 Hearings, supra p. 43, at 99).

24/ Indeed, certain passages of one brief filed by amici curiae in petitioner's support are virtually verbatim repetitions of the arguments advanced to the Senate subcommittee. Compare Brief of Amici Curiae State of Washington, et al., [footnote continued]

the Senate subcommittee to amend Section 1988, representatives of the National Association of Attorneys General were candid about the fact that Congressional intent in the enactment of the 1976 Fees Act was unequivocal on several key points. See, e.g., 1981 Hearings, supra p. 43, at 543 (conceding that pursuant to the legislative history of the 1976 Fees Act a prevailing party is entitled to counsel fees even if represented by an attorney practicing with an organization, and citing the House Report, supra p. 17 n.13, at 8, n.16). As the Deputy Attorney General for North Carolina, James Wallace, emphasized in his testimony on behalf of the National Association of Attorneys General: "We are working with the Congress because I am convinced that the

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24/ [continued] on Petition for Writ of Certiorari at 29, n.15, with 1981 Hearings, supra p. 43, at 541.

solution can only come from Congress." 1981 Hearings, supra p. 43, at 585.

However, the Congress has thus far declined the requests of the state attorneys general to amend the 1976 Fees Act. Although the record of the 1981 and 1982 Hearings is replete with strong rhetoric on the need to reduce "excessive" attorney's fee awards, it is lacking in any detailed, objective documentation of either excessive fee awards or a need to modify the fees statute. For example, materials filed with the Senate subcommittee and reproduced in the record reveal that when a number of towns and cities throughout the country were asked (on a 1981 NIMLO questionnaire) to "[l]ist any unusually large attorney's fees awards in relation to the amount of damages awarded against the city," twenty-seven of the thirty-two towns and cities responding to the

questionnaire had not had any unusually large fees awarded against them. 1981 Hearings, supra p. 43, at 156-251. A number of the towns and cities responding went on to explain that no attorney's fees had ever been assessed against them under Section 1988. Id. at 160-61, 167-68, 172, 203, 228, 230-31.

Senator Hatch (who chaired the subcommittee hearings and heard testimony from several witnesses defending awards under the 1976 Fees Act as crucial to protecting citizens' constitutional rights) urged NIMLO officials to come up with more and better documentation for the amendments they were seeking. 1981 Hearings, supra p. 43, at 326.25/

25/ As Senator Hatch explained to one of the NIMLO witnesses:

> I would suggest that it would be a wise thing for NIMLO to try and do more statistical analyses of this and to document it even more. You

[footnote continued]

However, neither NIMLO nor any other proponents of amendments to the Fees Act produced additional documentation of the type requested by Senator Hatch at the 1982 hearings. Indeed, during the 1982 hearings Father Robert Drinan (who as a former member of Congress had been floor manager of the 1976 Fees Act in the House of Representatives) remarked upon the lack of detailed, hard information about fee awards throughout the country, and upon the need for a thorough survey and statistical analysis before Congress attempted to amend the 1976 Fees Act.

25/ [continued]

> have done plenty, but document even more so that we can have the true facts in this matter and then try to make what is the best decision to assist taxpayers and municipalities while, at the same time, protecting the constitutional and other civil rights.

1981 Hearings, supra p. 43, at 72-73.

1982 Hearings, supra p. 43, at 73.[26]

The Senate Judiciary Committee did not recommend or adopt any modifications in the Civil Rights Attorney's Fees Act of 1976. Nor were any similar measures recommended or adopted in the House of Representatives.[27]

This Court has recognized that in appropriate circumstances Congress' refusal to amend or modify a statute may provide an excellent guide to legislative intent. See, e.g., Herman & MacLean v. Huddleston, 103 S. Ct. 683, 689 (1983). Such circumstances are present in this

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26/ Father Drinan also pointed out that the requests for amendments in the Fees Act were advanced by state attorneys general and by municipal lawyers; he indicated that he did not think the Congress should be responsive to just one particular segment of the legal profession. 1982 Hearings, supra p. 43, at 72-73.

27/ In 1983, Senator Hatch again introduced similar attorney's fee legislation. S.141, 98th Cong., 1st Sess. (1983). There has been no action on this bill to date.

case: Congress was urged, but declined, to adopt precisely the kinds of modifications in the statute that petitioners now seek from this Court. Moreover, in the instant case, these recent indicia of Congressional intent are fully consistent with the express and unambiguous contemporaneous legislative history on the same points. Rarely has a record of Congressional action and Congressional intent provided such clear guidance. Yet petitioners, and their supporting amici, would have this Court adopt a "construction" of the statute which clearly contravenes Congressional intent. Their arguments should be rejected.

CONCLUSION

For the foregoing reasons, the Court should hold that the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. §1988, mandates fee awards to public

interest attorneys commensurate with fee awards to private practitioners, and that prevailing market rates and upward adjustments in appropriate cases are integral elements in making these awards.

Respectfully submitted,

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Amicus Brief

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No. 81-1374

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1981

BARBARA BLUM, individually and in her capacity as Commissioner of the New York State Department of Social Services,

Petitioner,

vs.

ELLEN STENSON, individually and on behalf of all other persons similarly situated,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF AMICUS CURIAE CALIFORNIA COALITION OF WELFARE RIGHTS ORGANIZATIONS IN SUPPORT OF RESPONDENTS

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I

INTEREST OF AMICUS

Amicus California Coalition of Welfare Rights Organizations (CCWRO) is a non-profit organization composed of individual welfare recipients and approximately 30 welfare organizations which are concerned with issues affecting poor people in California. The CCWRO was formed in 1978 to provide a forum for the member groups to develop joint positions on issues affecting the needy in California and then to advocate for those positions. One of the goals of CCWRO is to improve access to legal representation for the poor.

The welfare recipients who are members of CCWRO and its associated organizations are unable to pay for legal assistance because of their indigency. Therefore, they are dependent on legal aid programs and non-profit law firms when they are subjected to discrimination or other illegal treatment, as well as for assistance with all of their other legal problems. The CCWRO, its individual members, and its associated organizational members all have an

interest in the provision of legal services to the poor. They, therefore, all have an interest in establishment of the principle that court-awarded fees granted to legal aid programs and non-profit law firms should adequately reflect the value of the services performed.

II

INTRODUCTION

Petitioners and the various amici supporting petitioners have proposed that attorneys who work for legal aid offices and other non-profit law firms should be awarded less under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (the "Fees Awards Act"), than should attorneys in private practice who perform identical services in identical cases. The various proposals for computing fees all, in some way, base fee awards on "costs" to the attorneys' office. These suggestions ignore the legislative history of the Fees Awards Act, which plainly demonstrates that Congress intended that attorneys who work for legal aid and other

non-profit firms should receive awards comparable to those made to privately employed counsel, and that those awards must be based on the value of those services as computed in other kinds of complex litigation, not on law office costs.

This brief does not present that legislative history or the large body of case law which supports the respondents. The legislative history and the cases are very ably discussed in the briefs of respondent and other amici. Instead, this brief discusses the practical implications and policy concerns raised by the various proposals to award less to legal aid and non-profit attorneys based on the "costs" of litigation to the attorneys' law office employer.

III

SUMMARY OF ARGUMENT

Strong public policies mandate that attorneys working for legal aid, and other non-profit offices, be compensated equally with private counsel under the Fees Awards Act.

Only equal awards can prevent defendants from reaping a financial windfall when they violate the rights of indigents who are represented by legal aid counsel. And only equal awards can ensure that legal aid clients have an equal opportunity through counsel to dissuade others from violating their rights and to persuade defendants to settle litigation.

For the same reasons, fee awards under the Fees Awards Act must not be based on the "costs" of the litigation to the prevailing attorney's employer, whether publicly or privately funded, non-profit or for-profit. Further, any cost accounting approach would reward inefficiency and affluence, and would punish efficiency, frugality and sacrifice.

IV.

ARGUMENT

A. Awards To Legal Aid And Other Non-Profit Law Offices Must Be Equal To Awards To Private Law Firms Under The Fees Awards Act.

Until recently the federal executive branch recognized and supported the "strong considerations of public policy" which mandate that public interest firms and legal aid offices receive fee awards equal to those made to private attorneys for equal work. In Copeland v. Marshall, 641 F.2d 880, 900, n. 36 (D.C. Cir. 1980), the federal government's own brief urged that:

> "'[F]ees to these [public interest law] firms should not be less than would be the case had a for-profit firm brought the suit. Strong considerations of public policy require that such firms and lawyers receive fee awards equal to those made to firms and attorneys at large.' Memorandum of United States, supra note 34, at 4-5."

Nonetheless, the amicus United States, other State amici, and the New York agency petitioners they support ("the government") now suggest a variety of alternative methods

for calculating fee awards to non-profit law offices, including legal aid programs. All of these approaches result in non-profit law offices receiving smaller awards than would private law firms providing identical services in identical cases. The government justifies this inequity on the ground that any other approach would allow non-profit law firms such as legal aid programs to reap a "windfall" which private firms purportedly do not receive when they are awarded an identical amount of money for identical effort and results. However, the government's proposed formulae are all flawed for they all justify eliminating one supposed inequity by creating another by misconstruing the nature of a "windfall."

Congress, in enacting the Fees Awards Act, warned against fees that provide "windfalls to attorneys."[1/] Awards which unjustly

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1/ The report of the House of Representatives on the Fees Awards Act stated that it would "insure that reasonable fees are awarded to attract competent counsel in cases involving civil and constitutional rights, while avoiding windfalls to attorneys." H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. (1976), at p. 9. The Senate Report reflected the same concern.
(Continued)

enriched individual attorneys by giving them undeserved riches out of proportion to the services they provided would, of course, be "windfalls to attorneys." However, the concept of a "windfall" has no meaningful application to awards made directly to legal aid offices in amounts which reflect the value of the services their staff attorneys provided. Attorneys who work for legal aid programs never personally benefit from awards made under the Fees Awards Act. Instead, awards must go directly into the legal aid budget, and must be used to provide additional legal services for indigent clients.[2/] The beneficiaries of fee awards to legal aid offices, then, are poor people, not attorneys.

A fee award to private counsel in a

Footnote Continued:

"It is intended that the amount of fees awarded under [the Fees Awards Act] be governed by the same standards which prevail in other types of equally complex Federal litigation. * * * These cases have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys." S. Rep. No. 94-1011, 94th Cong., 2d Sess. (1976), at p. 6.

2/ 42 U.S.C. § 2996f(a); 45 C.F.R. § 1609.5.

civil rights action, on the other hand, supports the firm's modern equipment, prestigious office location, modern equipment, generous salaries for associates, and profit, all of which benefit the attorneys not the clients.[3] An equal award to a legal services program would buy the services of more attorneys willing to work at modest legal aid salaries under difficult conditions in order to expand the meager pool of lawyers available to assist the poor with their burgeoning legal problems.[4]

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[3] Amicus does not point out this fact to denigrate private firms which accept plaintiffs' civil rights cases on a pro bono basis or solely in anticipation of a court award if they win. These firms run a substantial risk of not receiving any compensation for their work while at the same time foregoing other lucrative fee-for-service work. Such sacrifices by the private bar should be applauded, and rewarded, in order to fairly compensate those attorneys and to encourage others to increase their efforts on behalf of the victims of discrimination and government misconduct.

[4] In 1980 it was estimated that funding for the federal Legal Services Corporation (LSC) which supports legal aid offices throughout the country was sufficient to pay for less than one-fourth of the services necessary to fully serve the poor. Bellow, Legal Aid in the United States, 14 Clearinghouse Review 337, 342, n. 35 (July 1980). Since then the LSC budget has been reduced 25%. Act of December 15, 1981, Pub. L. No. 97-92, 95 Stat. 1190 (1981).

To characterize the expansion of legal services by awards under the Fees Awards Act as a windfall, while sanctioning equal awards to private attorneys, robs the notion of "windfall" of all equitable content.

In reality an award to a legal aid program which is equal to awards to profit-making firms does not unjustly enrich the legal aid program or its clients. To the contrary, a lesser award would be a windfall to defendants, whose total liability for illegal behavior would fluctuate not with the merits of a suit or the work that goes into it but with the funding source of plaintiffs' counsel. See, for example, the opinion of the California Supreme Court in Serrano v. Unruh, 32 Cal.3d 621, 642, 682 P.2d 985 (1982), summarizing federal decisions and concluding that legal aid and public interest lawyers should receive fee awards equal to those that would be made to private counsel under California's private attorney general statute (Cal. Code Civ. Proc. § 1021.5):

> "If an occasion to compensate legal services organizations at prevailing

> rates seems to give them a 'windfall', it is one that accrues to the benefit of public-interest litigation. It thus warrants less judicial scrutiny than would a comparable 'windfall' to defendants."

In addition to expanding the availability of legal services and eliminating windfalls to defendants, equal awards to legal aid offices would serve a number of other beneficial, and equalizing, public policies. Such awards would equalize the ability of legal aid attorneys and private attorneys (and therefore of their respective clients) to discourage defendants from engaging in illegal conduct and to settle litigation when they are sued.

Normally, the prospect of a fee award can encourage a recalcitrant defendant to bring its behavior into compliance with the law, and to settle if sued. However, if defendant's opponent is a legal aid lawyer, the defendant will have less financial incentive to obey the law or to settle than if the opposition in an identical suit challenging identical misconduct were an attorney in private practice. The indigent clients of legal aid,

of course, bear the brunt of that inequality, as do the potential legal aid clients who are unable to obtain assistance because legal aid lawyers are tied up litigating cases the defendants should agree to settle.

All considerations of public policy--equity, promoting the provision of legal services for the victims of discrimination, deterring illegal conduct, and encouraging settlement--weigh in favor of equal awards to legal aid offices and private counsel.

> "Legal aid organizations can expand their services to indigent civil rights complainants by virtue of their receipt of attorneys' fees. And a defendant sued by a plaintiff retaining legal aid counsel should not be benefited by the fortuity that the plaintiff could not afford private counsel. Thus, whether the focus is on enabling suit by those otherwise unable to afford litigation, or on deterring misconduct by imposing a monetary burden upon the wrongdoer, a legal aid organization merits an attorney's fee fully as much as the private attorney." Oldham v. Ehrlich, 617 F.2d 163, 168-69 (8th Cir. 1980).

Any method of calculating fee awards under the Fees Awards Act which results in legal aid attorneys receiving a smaller award than private attorneys for equal work denigrates

the efforts of legal aid attorneys and the rights and needs of their clients. All attorneys' efforts, if equal, should be equally compensated under the Fees Awards Act.

B. Fee Awards Under The Fees Awards Act Should Not Be Based On Costs And Overhead, Regardless Of The Attorney's Employer.

All of the government's suggested formulae for awarding fees under the Fees Awards Act to legal aid programs and non-profit law firms tie the fee award to the firm's salary or overhead costs. And most of the suggested formulae also make costs a factor in setting fee awards for private counsel. These "cost accounting" approaches would all generally result in smaller awards to legal aid and non-profit offices than to private attorneys performing equal services, an illogical inequity which gives defendants a windfall, as discussed above.

The cost accounting approaches also suffer from additional flaws. For example, they involve the court in laborious analysis

of a mass of data which is not in any way related to the value of legal services. The California Supreme Court, in rejecting a cost accounting approach to fee awards in public interest litigation under the state's private attorney general statute, noted some of the perplexing questions that are raised if fees are measured by the actual costs of the specific office providing the services. For example, what formula could possibly accommodate the wide variety of financial structures and duties of private firms and non-profit and legal aid offices?[5/] Even if such a formula

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[5/] Some legal aid offices are funded by direct grants. Some LSC-funded support centers, on the other hand, receive grants "passed through" other legal aid offices and share office space. Some offices only do traditional legal work. Others are required to provide non-traditional services in the form of technical support to attorneys in yet other legal aid offices, and when they do so are not required to maintain hourly time records. Some pay "costs" which are artificially low because of the charity of providers such as landlords; others compete in the market for space and supplies. No single formula could fairly set a per hour cost for a legal aid attorney's efforts in a suit which accounts for these differences. And the formulae which might be designed separately for each case are probably not worth the effort. See, e.g., Glover v. Johnson, 531 F.Supp. 1035, 1047 (Appendix A) (E.D. Mich. 1982) in which a

(Continued)

(or series of formulae) could be developed, would financial records then be discoverable, and if so would privacy be violated?[6/] The Court noted that answering such questions could: "Ironically ... prolong fee litigation, burdening the courts, and hence increase the very awards defendants seek to reduce." Serrano v. Unruh, supra, 32 Cal.3d at 642. n. 37.

Further, if legal work is compensated under the Fees Awards Act on the basis of "costs" (such as salaries, rent, support staff, library, etc.), a law office would be punished if it decided to keep salaries and costs low so that the office could stretch its budget to provide more services to the victims of discrimination. Salaries and overhead do

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Footnote Continued:
court attempted to develop and apply a complicated formula which was relevant solely to the legal aid program involved in that case, only to arrive at hourly rates comparable to those awarded in this case.

[6/] One of the issues on appeal in Serrano was whether detailed information on the salaries of public interest law firm personnel was discoverable. A private firm, if faced with the loss of financial privacy threatened in Serrano, might well decide to defend rather than prosecute civil rights cases.

not always reflect the relative value of attorneys' services. Rather, at least in the case of legal aid programs, they "'reflect the relative poverty of legal services funding.' [citations omitted]. Legal services attorneys are paid (and accept) lower salaries in order that the limited funds available may generate the greatest possible volume of legal services for the needy." Becker v. Blum, 487 F.Supp. 873, 875 (S.D.N.Y. 1980). The fact that an award would be used by a legal aid office to finance other litigation on behalf of the poor, rather than to finance more generous salaries and comfortable working conditions for its staff attorneys, should not justify devaluing the work of those attorneys.

One way to analyze the perverse effect of cost accounting methods is to suppose that a legal aid office decided to double its low salaries, move to luxurious offices, and pay for those changes by cutting its legal staff in half. Although the office would then be providing one-half of the services it previously did, by the logic of a cost accounting approach

it would then deserve awards under the Fees Awards Act at twice its previous rate. A cost accounting approach thus could reward, and in fact encourage, avarice, inefficiency, and indifference to the plight of under-represented people. Conversely, cost accounting requires that if additional federal budget cuts force a legal aid office to reduce salaries, curtail travel, and slash its litigation budget, then that program's legal work would automatically be devalued even if the quality of its work did not decline.

Other kinds of non-profit law offices also can experience years with decreasing income, which would automatically lower their fee awards in those years if cost accounting formulae were used. Many non-profit firms depend on support from foundations and donors. This support fluctuates with the rate of individual giving and the competing demands of other charities. Further, a non-profit firm may work on a case for years without compensation, and then receive an award in one year

for all its efforts.[7/] Ironically, illogically, and unfairly, the cost accounting approaches would decrease hourly rates awarded to these non-profit law offices during their years of relatively greater need and would increase awards during their years of lesser need--all without taking into account the actual value of the services they provide in the cases in which the awards are made.

Private firms could be similarly affected, of course, especially if they accepted a number of discrimination cases from indigents, and worked without fee at great personal sacrifice. Until a fee was awarded, that firm's income would be down; therefore its "costs" would also be down since it would of necessity be spending less when it had less. Under a cost accounting approach, the private firms which made the greatest sacrifice for the victims of discrimination

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[7/] Many legal aid offices receive some contributions to augment their LSC grants and receive fee awards. Reduced giving and delayed awards would affect them just as it would other non-profit firms under the cost accounting theories.

would receive the lowest awards. Firms which charge high hourly rates and rarely work for free would, on the other hand, be entitled to the highest awards under cost accounting methods. As the California Supreme Court has noted: "Costs--high or low--can be subjective and if deemed relevant to value might reward inefficiency and greed." Serrano v. Unruh, supra, 32 Cal.2d at 641.

The illogic and unfairness of a cost accounting approach and the difficulty of its application mandate that fees in Fees Awards Act litigation not be dependent on any formula linked to the "costs" of the law offices.

V

CONCLUSION

All of the formulae suggested by the government for setting fees under the Fees Awards Act illogically reward defendants for their good luck in drawing legal aid or other non-profit law firm opposition when they violate poor people's rights. Those formulae also all punish legal aid offices, non-profit

firms, and private law firms willing to do pro bono litigation for their efficiency, frugality, and dedication to public service.

For these reasons, amicus respectfully requests this Court to affirm the judgment below of the United States Court of Appeals for the Second Circuit.

DATED: October 24, 1983.

Respectfully submitted,

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By _____
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CERTIFICATION OF SERVICE

I, MARY S. BURDICK, HEREBY CERTIFY that on October 24, 1983, true and correct copies of the foregoing BRIEF OF AMICUS CURIAE CALIFORNIA COALITION OF WELFARE RIGHTS ORGANIZATIONS IN SUPPORT OF RESPONDENTS were mailed, pursuant to Rule 28, Rules of the Supreme Court of the United States, by depositing same in a United States mailbox, with first-class postage prepaid, to the following parties:

See attached list.

DATED: October 24, 1983.

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Amicus Brief

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IN THE

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OCTOBER TERM, 1983

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ELLEN STENSON, individually and on behalf of all other persons similarly situated,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR AMICI CURIAE OLIVER HILL, DANIEL R. EDELMAN, JULIUS L. CHAMBERS, ALICE BEASLEY, ELIZABETH JULIAN, HERBERT TEITELBAUM, AND JUDSON H. MINER IN FAVOR OF AFFIRMANCE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 81-1374

BARBARA BLUM, individually and in her capacity as Commissioner of the New York State Department of Social Services,

Petitioner,

v.

ELLEN STENSON, individually and on behalf of all other persons similarly situated,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR AMICI CURIAE OLIVER HILL, DANIEL B. EDELMAN, JULIUS L. CHAMBERS, ALICE BEASLEY, ELIZABETH JULIAN, HERBERT TEITELBAUM, AND JUDSON H. MINER IN FAVOR OF AFFIRMANCE

INTEREST OF THE AMICI*

Amici curiae are lawyers in small firms in different parts of the country. Each of the amici has had experience in cases under statutes authorizing court-awarded attorney fees, including 42 U.S.C. § 1988. Each of the amici is also familiar with the difficulties of financing a law practice in which a portion of the work is done on a contingent fee basis, although most of the amici depend upon noncontingent work for the bulk of their practice and income.

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* The parties have consented to the filing of this brief. Their letters have been lodged with the Clerk of this Court.

Amici have been especially surprised and concerned by the statements in the brief of petitioner and her amici, made without support, that suggest that there is a thriving practice in cases for which fees are authorized, and suggesting that fees have been so large as to attract large numbers of lawyers to take civil rights cases on a contingent fee basis. Amici's personal knowledge is directly to the contrary.

Amici would like to continue and, in most cases, increase, the work they do in these cases of fundamental national importance, and they would like to be joined by other lawyers as well. Each of these goals is already threatened by uncertainty over whether adequate fees, which take into account the difficulty of contingent fee work, will be available. Amici therefore file this brief to explain why reversal of the judgment below would severely exacerbate an already critical situation.

The amici are:

Oliver Hill, HILL, TUCKER & MARSH, Richmond, Virginia

Daniel B. Edelman, YABLONSKI, BOTH & EDELMAN, Washington, D.C.

Julius L. Chambers, CHAMBERS, FERGUSON, WATT, WALLAS, ADKINS & FULLER, Charlotte, N.C.

Elizabeth Julian, JULIAN, DANIEL & VILLARREAL, Dallas, Texas

Judson H. Miner, DAVIS, MINER, BARNHILL & GALLAND, Chicago, Illinois

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Herbert Teitelbaum, TEITELBAUM & HILLER, New York, N.Y.

ARGUMENT

THE LOWER COURTS' RECOGNITION OF THE CONTINGENCY FACTOR IN SETTING THE FEE IN THIS CASE DID NOT PRODUCE A "BONUS" BUT INSTEAD PRODUCED A FEE THAT WAS "REASONABLE" WITHIN THE MEANING OF 42 U.S.C. § 1988

This amicus brief is filed to address a single issue: the petitioner's claim that the fee awarded in this case includes an improper "bonus" above a "reasonable" or "fully compensatory" fee. This brief is not designed to repeat the arguments of the respondent and the other amici in support of the judgment below, but we believe that, by virtue of our experience and the nature of our practices, we can help bring to life some of the factors involved in setting a fee, in particular the all-important factor of contingency.

Petitioner's argument is that even in a case where payment is highly contingent, a fee calculated on the basis of the same hourly rate that a particular lawyer would charge for normal, timely paid work is "fully compensatory," and that anything over that level (except perhaps for a "modest" adjustment, Pet. Br. 41, or "slight" increase, Sol. Gen. Br. 21 n.15) is an unwarranted windfall which is unnecessary to fulfill Congress' goal of attracting competent lawyers to take civil rights cases. Amici submit that acceptance of that position is contrary to the instructions of Congress and will insure that civil rights cases will continue to be the exclusive province of a few lawyers' occasional *pro bono publico* efforts. As we show below, fee awards which do not take into account the added risks and burdens of contingency are not "reasonable" attorney fees. Such fees by their nature cannot attract, and in fact have not attracted, sufficient legal resources to these cases as Congress hoped.

1. The fundamental reality of the Civil Rights Attorney's Fees Awards Act of 1976 is that Congress intended cases covered by the statute to carry themselves in the marketplace rather than being dependent upon the charitable impulses of individual lawyers or individual contributors to charitable or legal aid organizations. Congress knew that these *pro bono* efforts, laudable as they were, fell drastically short of the need to provide representation in meritorious cases. The 1976 Act was therefore designed to provide attorney fees in order to draw *new* or *additional* lawyers into taking civil rights cases, both by encouraging lawyers in traditional practice to take civil rights cases without fear of inadequate payment, and by developing a specialized bar of skilled lawyers, as is true in the antitrust field. In other words, Congress intended by the authorization of reasonable fees that a practitioner should view civil rights cases as essentially equivalent to other types of work, and should feel free to take a section 1988 case just as he or she might decide to take any other case, without the prospect of inadequate payment disqualifying it.

No one will disagree with this proposition. The only question is what is required to make lawyers view civil rights cases as equivalent to other cases; that is, how does a court follow Congress' instructions to set reasonable fees that *will* attract lawyers to cases like this one.

The answer of the petitioner and her amici is that a fee based on the lodestar rate—an hourly rate that one would charge for guaranteed, promptly paid work—is "reasonable," or, as the Solicitor General describes it, "fully compensatory." That view is in conflict with the instructions of Congress and the views of this Court, as spelled out in Justice Powell's majority opinion in *Hensley v. Eckerhart*, 461 U.S. ——, 103 S. Ct. 1933 (1983). In *Hensley*, this Court has already decided that the rate for guaranteed-payment work "does not end the inquiry."

It is simply the "starting point" because there remain "other considerations" affecting the fee. 103 S. Ct. at 1939-40. Those considerations, as this Court noted, *id.* at n.9, are identified in *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974), which in turn took them from the standards developed by the American Bar Association to guide lawyers in setting reasonable fees.

Among the various factors which come into play, contingency is clearly paramount.[1] Anyone familiar with law practice knows it is simply unrealistic to suppose that the rate paid for guaranteed-payment work bears any relationship to a fee which is reasonable for a contingent case. A lawyer who chooses to take a case where the fee is contingent assumes enormous burdens not faced in non-contingent work. These burdens include both the risk of not being paid at all—for either time or out-pocket expenses—and the fact that whatever payment *is* made comes years after the work is done, sometimes more than a decade later, and in dollars which have been severely devalued. (The use of current rather than historic rates, as is done by many courts, lightens only the last burden —inflation—not the risk nor the delay.) See note 4 *infra*.

The lodestar method of setting the fee approved by this Court in *Hensley* is designed to take these burdens into account. Since there is virtually no such thing as a market hourly rate for contingent fee work, the lodestar begins with the rate for guaranteed-payment work. That

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[1] For example, contingency is listed first among the adjustments to the lodestar in the discussion in Copeland v. Marshall, 641 F.2d 880, 892 (D.C. Cir. 1980) (en banc). In this case, the district court relied on several of the *Johnson* factors to set a rate 50% higher than the rate for guaranteed, timely paid work. In the view of amici, however, the 50% increase would have been more than justified even if no factor other than contingency had been involved. See generally S. Berger, *Court Awarded Attorneys' Fees: What is "Reasonable"?* 126 U. PA. L. REV. 281 (1977); J. Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, 90 YALE L.J. 473 (1981). (Of course, as held in *Hensley*, limited results in a particular case can reduce the fee.)

figure, though, is simply an element in the construction of the end-product, which is a reasonable fee for the circumstances. By going above the guaranteed-payment hourly rate in order to reflect the very real costs of contingent fee work, the court is not adding a bonus to a reasonable fee, but is rather adjusting the "lodestar" so that the ultimate fee will reflect a reasonable market rate for contingent work.

The contingent fee is a mechanism designed to make lawyers willing to spend large amounts of time and money in order to represent people who otherwise would not be represented—precisely the type of people for whose benefit Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976. As the briefs for Respondents and the supporting amici have detailed, Congress was clearly aware when it passed this Act in 1976 that reasonable fees would include upward adjustments for contingency. Absent a lodestar adjustment for contingency, the fee in a civil rights case is not the "reasonable attorney fee" specified in the 1976 Act, and practitioners who would ordinarily undertake this type of representation are precluded from doing so.[2]

2. The Solicitor General recognizes that the fees in contingent cases must be higher than those in guaranteed-

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[2] Petitioners claim the support of the Sixth Circuit for their position, at page 36 of their brief, by misleadingly quoting two sentences from Northcross v. Board of Education, 611 F.2d 624, 638 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980). Those two sentences reject "bonuses," it is true, but the petitioners unaccountably truncate the quotation by omitting the sentences directly following, in which the sixth circuit explains that a fee above a routine hourly rate is *not* a bonus when various factors—especially contingency—are involved. The passage concludes with the flat statement that "the contingency factor is not a "bonus" but is part of the reasonable compensation to which a prevailing party's attorney is entitled under § 1988." 611 F.2d at 638. *Accord* M. DERFNER & A. WOLF, COURT AWARDED ATTORNEY FEES ¶ 16.04[1], at 16-78 & 79, ¶ 16.04[2], at 16-84 (1983).

payment cases, but suggests, without any support whatever, that lawyers will be induced to undertake § 1988 cases by the prospect of "slightly higher hourly rates" than the "normal hourly rates" they charge promptly paying clients. Sol. Gen. Br. 21 n.15.[3] All the facts that are available, however, confirm that lawyers will not take contingent cases unless the effective hourly rates are much more than "slightly" higher.

Two prominent lawyers have described their approaches to this question, and both have indicated that the effective hourly rate for a contingent case must be at least twice as high as the guaranteed payment hourly rate to make it feasible to take a contingent case. First, Jerome Falk, of Howard, Rice, Nemerovski, Canady, Robertson & Falk, in San Francisco, has described how his firm evaluates a proposed contingent case:

> When asked to handle a case on a contingent fee basis, we regularly attempt to make evaluation of the prospects for a recovery and the amount of that recovery. Because of the substantial risk of contingent fee litigation, and because such fees are not paid until the completion of the litigation (which, these days, may mean five years or more), a rule of thumb which we follow is that the anticipated fee, if successful, should be *at least* twice the value of the projected time to be expended at our regular hourly rates. If the projected fee does not meet this standard, we would ordinarily decline to handle such a matter. In my judgment, such a formula does

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[3] Although the Solicitor General's brief purports to reflect two separate interests—the interest of federal litigants in minimizing fees that they will have to pay, and the interest of federal law enforcers in encouraging private enforcement by insuring adequate fees—it is apparent that the brief in fact reflects only the first perspective. That the brief is in fact hostile to private enforcement is shown by many indications, not the least of which is the insulting reference to "self-appointed guardians of the public interest." Sol. Gen. Br. 19.

> not produce undue or excessive compensation for attorneys. [Emphasis in original.] [4]

Likewise, Robert S. Vance, of Birmingham, before he was named to the Fifth Circuit, testified that his firm's rate in 1977 for *non-contingent* work was approximately $75 per hour for him and $45 per hour for a younger lawyer. He was then asked what he would charge for the case in question if it had come in as a contingent case:

> "I wouldn't handle it for a hundred dollars an hour contingent basis; I wouldn't allow juniors in my firm to handle it for a hundred dollars an hour on a contingent basis." [5]

Given the expectation that a contingent case will produce twice the "rate" produced by a guaranteed payment case, it is clear that to set aside the 50% enhancement awarded in the instant case, as petitioner prays, would, quite simply, repel lawyers from cases like this.[6]

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[4] Declaration of Jerome B. Falk, Jr., January 31, 1980, p. 2, filed in Westerlund v. Firemen's Fund Ins. Co., 24 FEP Cases 1190 (N.D. Cal. 1980). Mr. Falk's declaration goes on to explain why his firm treats contingent cases in this way:

> Some cases are lost and no compensation is paid the attorney. Other cases are settled on a substantially discounted basis, with the fee being reduced accordingly. When the case proceeds to trial the economic burdens of contingent fee litigation on a law practice are enormous. Rents, staff salaries, and other items of overhead have to be paid on an ongoing basis with no corresponding fees to support them. The cash flow burden can, accordingly, be substantial. Fees that are received three, four, or five years after the services are rendered are paid in dollars, the value of which has been deflated due to inflation.

[A copy of this declaration has been lodged with the Clerk of this Court.]

[5] Deposition of Robert S. Vance, January 31, 1977, p. 29, filed in Bolden v. City of Mobile, 446 U.S. 55 (1980). [A copy of this deposition transcript has been lodged with the Clerk of this Court.]

[6] The petitioner and the Solicitor General try to distinguish the antitrust cases (which Congress has cited as the proper compari-

3. Petitioner and her amici suggest that the fees awarded in recent years under § 1988 have simply enriched lawyers, Pet. Br. 38, and have led to lawyers "literally lining up" to take these cases. Br. of Amici Curiae States of Washington, et al., in Support of the Petition for Certiorari, 9.

With all due respect, there is simply no evidence of any sort, in this record or anywhere else, to support those claims. Indeed, the experience of the amici is just the opposite. First, our experience is that lawyers or firms engaged in traditional law practices do not take civil rights cases any more frequently than they did before fees were available.[7] Second, to the best of our knowledge, the number of lawyers in private practice in the entire nation for whom a substantial part (one-third or more) of their income annually comes from fees authorized by Congress (whether by judgment or settlement) is infinitesimal. Moreover, the number of lawyers in private practice who will undertake a substantial civil rights case (whether a class action or a sizeable individual action) has not increased since 1976, and may

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son), which have routinely recognized that the guaranteed hourly rate is not an adequate rate for a contingent fee award, by suggesting that such fees are awarded only in common fund cases. Petitioner's suggestion is simply wrong. Antitrust attorney fees awarded directly against defendants are measured by the same standard as common fund antitrust fees. See, e.g., McDonald v. Johnson & Johnson, 546 F. Supp. 324 (D. Minn. 1982).

[7] The petitioners at page 28 cite McCann v. Coughlin, 698 F.2d 112, 130 (2d Cir. 1983), for the proposition that a sharply limited fee is still enough of an incentive to get firms to take civil rights cases. That case, however, was undertaken by the Cravath firm as a pro bono matter "with no concern whether it would be compensated for its efforts." *Ibid.* In other words, it was an example of the pro bono representation that some large firms undertook in some cases even before attorney fees were available, rather than an illustration of an attorney fee that is sufficient to attract a lawyer who would not or could not otherwise undertake the case.

have decreased, since few new lawyers are entering the field and many of those formerly engaged in this type of case have left because of the impossibility of earning a decent income.[8]

The experience of two leading civil rights lawyers bears this out. Richard Sobol, of Washington, D.C., has testified about his abandonment of contingent fee civil rights cases in recent years:

> 16. In my observation over my years of practice, I know of no lawyers who are able to support themselves by Title VII or other employment discrimination litigation. At present I am aware of no experienced Title VII litigator who would take on a substantial employment discrimination class action case entirely on a contingent basis. That is, in significant part, a result of the inadequate fee awards that have been made in cases where plaintiffs prevailed, as I discuss in paragraph 21.
>
> 19. I have found that investing thousands of hours and thousands of dollars on a contingent basis in such cases is no longer economically justifiable. I have not taken an employment discrimination case on a contingent basis since 1975 and I know many other practitioners who handled such cases on a contingent basis in the years from 1968 to 1975 but no longer do so.
>
> 23. I believe there is a real danger that private practitioners will dry up as a source of representation in such cases because of the economic difficulties and risks involved. It is especially discouraging to see experienced litigators, who know how to present such cases properly, turning away from them . . . .[9]

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[8] Of course there is no record on these matters, and amici cannot ask this Court to accept these statements as fact. The point is simply that the unsupported assertions of petitioner and her amici to the contrary should not be a factor in this Court's decision.

[9] Affidavit of Richard B. Sobol, February 25, 1983, pp. 6-9, filed in Laffey v. Northwest Airlines, Inc., C.A. No. 2111-79 (D.D.C.

Likewise, Fletcher Farrington, of Savannah, testified before Congress last year in opposition to a bill which would have eliminated the consideration of contingency in setting court-awarded fees in civil rights cases:

> [T]he 1976 amendment to § 1988 has had no affect on the number of cases filed under § 1983. As my summary demonstrates, these cases remain at the very low end of economic desirability. If they were desirable, other lawyers would not refer them to me but would try them themselves. Ninety percent of my cases come on referrals from other lawyers. In eleven years, I have devoted approximately 2400 hours of litigating "pure" § 193 [§ 1983] cases. To date, I have recovered a total of $25,000 in attorney's fees, on verdicts totalling $174,000. On cases tried since the 1976 amendments to § 1988, I have obtained verdicts totalling $134,000, and have received fees of $24,000. No nonprofit civil rights organization has supported any of these cases. While my rate of return—$10.00 per hour—may improve, depending on the decisions in three cases that are now pending before trial and appellate courts, it will never improve to the point where I earn as much as the lawyers on the other side. The only case I have ever taken because of the prospect of adequate compensation is the one in which I am defending the City of Sylvania, for which I am paid on a hourly basis as the work is done. The 1976 Attorneys' Fees Act has not produced a "windfall" for attorneys regularly engaged in civil rights practice.[10]

July 29, 1983). [A copy of this affidavit has been lodged with the Clerk of this Court.]

There may be some people who can afford to retain lawyers at non-contingent rates (often with time payments) to handle individual cases, but Congress obviously did not intend to assist only those few people who could afford some degree of legal representation.

[10] Hearing on S. 585, A Bill to Provide a Special Defense to the Liability of Political Subdivisions of States Under Section 1979 of

Mr. Farrington made it clear that his ability to continue taking these cases is based on the possibility that he may at some point recover a reasonable fee, and he concluded starkly:

> Absent contingency or multiplier adjustments, this amendment will end my civil rights practice on behalf of plaintiffs.[11]

Notwithstanding a few recent cases, most civil rights fee awards have still failed to take account of the difficulty of contingency. Therefore the doubts about the availability of adequate fees remain, and the discouraging experience of people like Sobol and Farrington has been the norm. See, e.g., National Law Journal, p. 1 (May 28, 1979). Amici are confident that a careful look will show that far from petitioner's claims of a wave of lawyers coming in to take these cases for the exorbitant fees to be gained, the truth is that the results have not yet come close to meeting Congress' goals.

4. Finally, the petitioner argues that even if the considerations relating to contingency are relevant in setting the fees of lawyers in private practice, they have no application when it comes to salaried lawyers employed by nonprofit organizations.[12] There are several definitive

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the Revised Statutes (42 U.S.C. 1988) Relating to Civil Actions for the Deprivation of Rights, and on Amendments to be Proposed by Senator Orrin G. Hatch, Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 97th Cong., 2d Sess. 49 (March 1, 1981) (footnote omitted). The bill did not pass.

[11] *Id.* at 54.

[12] While this amicus brief does not deal with the question of the appropriate hourly rate or with the argument of the petitioner and some of her amici that the rate paid to a lawyer not in private practice should be pegged to that lawyer's salary (with no consideration of contingency), rather than a market rate, it is worth noting that the states do not take this position when they are

answers to this argument: First, and most compelling, as spelled out in the Respondent's Brief, and the supporting amicus briefs, Congress rejected any such distinction, because the same considerations that led Congress to view inadequate fees as obstacles to its enforcement goals apply equally well to private practitioners and staff lawyers for nonprofit organizations. Second, any decision lowering the fees of salaried lawyers will diminish the important deterrent value of attorney fees in this field, *Carey* v. *Piphus*, 435 U.S. 247, 263 n.11 (1978), and further underline the view that these are second-rate cases on behalf of second-class litigants. Finally, the shrinking number of private lawyers who will do cases covered by § 1988, and the federal government's retreat from vigorous enforcement in many areas have multiplied the burden on the nonprofit, charitable, and legal services organizations. Lowering their fees, and thus diminishing their capacity now would simply multiply the difficulty that civil rights clients already have in finding adequate representation for meritorious claims, and would thus further defeat Congress' grand goal in passing the 1976 Act and other attorney fee legislation.

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seeking fees. Thus, in *In re* Fine Paper Litigation, 98 F.R.D. 48, 228-33 (E.D. Pa. 1983), nine states, all of whom are amici supporting petitioner in this case, asked for and got market rates plus 50% for salaried lawyers in their Attorney General's offices. The court there pointed out that "since attorneys general do not charge hourly rates as do private counsel, each state fee petition requests compensation [for all state lawyers] based on the prevailing rates charged by private attorneys with similar experience for similar work in the same community." Id. at 229. And, in upholding the states' requests for "contingency multipliers" of 50%—the same as in this case—the court in *Fine Paper* held that "the risk that a state attorney general's office will not be compensated for the work of its staff is the same as the risk that a private partnership will not be compensated for the work of its members." *Ibid.* See also In re Cement and Concrete Antitrust Litigation, 1980-81 CCH Trade Cas. ¶ 63,797 (D. Ariz. 1980), where the lead attorney from the Arizona Attorney General's office was awarded a rate of $125 per hour multiplied by a factor of 2.25.

CONCLUSION

Congress' authorization of attorney fees is futile unless the fees are adequate. The promise of effective enforcement of our civil and constitutional rights therefore requires affirmance of the judgment below. Petitioners, by praying for reversal of the judgment, would, in the words of Macbeth, "keep the word of promise to our ear, And break it to our hope."

Respectfully submitted.

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On Writ of Certiorari to
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BRIEF OF AMICUS CURIAE Commonwealth of Massachusetts In Support of Petitioner

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No. 81-1374

IN THE
SUPREME COURT OF
THE UNITED STATES

October Term, 1981

BARBARA BLUM,

Petitioner,

v.

ELLEN STENSON, et al.,

Respondents.

On Writ of Certiorari to
the United States Court of
Appeals for the Second Circuit

BRIEF OF AMICUS CURIAE
Commonwealth of Massachusetts

INTEREST OF AMICUS CURIAE

Rarely has a federal statute had the immediate and explosive impact on state litigation as has the Civil Rights Attorney's Fees Awards Act of 1976. Particularly after Maine v. Thiboutot, 488 U.S.

1 (1980), it has become routine for all governmental litigation--from the most complex institutional reform cases to the commonplace complaints for state judicial review of administrative decisions--to include requests for attorney's fees under the Act. Not surprisingly, the soaring number of attorney's fees claims is reflected in the burgeoning amount of litigation engendered by the Act itself.

This development is both undesirable and unnecessary. One can hardly conceive of a less socially valuable use of resources than fees litigation. State and federal taxpayers are now routinely treated to the spectacle of publicly-funded counsel making claims for fees to be paid by publicly-funded agencies, defended by publicly-funded attorneys general, and decided by publicly-funded courts. While no single participant in

these exercises is exclusively responsible, it it the Commonwealth's firm belief that the lack of reasonable standards governing the application for and adjudication of fees awards, particularly those involving publicly-funded legal services organizations, has unnecessarily encouraged unreasonably high requests, stymied settlement efforts, and forced these matters into litigation.[1/]

Thus, the Commonwealth's interest in this case, one which it shares with all

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1/ For example, in Brewster v. Dukakis, 544 F. Supp. 1069 (D. Mass. 1982), plaintiffs' counsel sought fees of $1.2 million, including a 100% bonus. Following litigation, the district court awarded $386,204, including a 10% bonus. Had the parties understood that bonuses are not authorized under the Act, the gulf between what plaintiffs were seeking and what defendants were willing to pay would have been far narrower and settlement much more likely.

state[2/] and local governments, is in the removal of the major "wild cards" in the calculation of attorney's fees awards. The use of easily ascertainable costs as the basis for awards to publicly-funded legal services organizations and the elimination of bonuses would render the application of the Act more certain, predictable, and consistent, and, hence, more reasonable. Greater certainty would promote settlement, reduce litigation, and permit counsel on both sides to devote more attention to substantive matters.

The Commonwealth, through its Attorney General, wishes to emphasize that it endorses the salutary purpose of the Act and is committed to the Act's concept of

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2/ The Commonwealth fully supports the amicus curiae brief of the other states.

reasonable fees. Further, the Commonwealth believes it essential that adequate funding be made available to organizations providing free legal services to indigent persons.[3/] However, overly generous rewards under the Act, which may result from courts' desires to ensure the fiscal stability of such organizations, unfairly penalize states such as Massachusetts which have undertaken to ensure adequate direct funding of legal assistance organizations. Bonuses and awards based on the high standards of legal remuneration adopted in the private sector result in payments over and above the actual and reasonable costs of legal serv-

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3/ Accordingly, in 1982 the Commonwealth acted to supplement the budgets of organizations funded by the federal Legal Services Corporation by creation of the Massachusetts Legal Assistance Corporation. See Mass. Gen. Laws Ann. c. 221A (West Supp. 1983).

ices counsel and may risk turning the public away from the award of fees to publicly-funded attorneys altogether.

SUMMARY OF ARGUMENT

The Civil Rights Attorney's Fees Awards Act of 1976 was intended to remove financial impediments barring plaintiffs from vindicating their civil rights in court. In order to achieve this purpose, the Act authorizes the district courts, in their discretion, to award prevailing parties "a reasonable attorney's fee as part of the costs" of a successful civil rights action. The amount of such fee awards was intended to be adequate to attract competent counsel without bestowing a windfall on the recipient. The statute must be construed narrowly to conform to this limited purpose. Traditional rules of statutory construction also mandate a

narrow construction of this Act, which is in derogation both of the common law and of the states' sovereign immunity under the Eleventh Amendment. (Pp. 9-19.)

The fee award in this case, which includes a 50 percent bonus and hourly rates based on those charged by private law firms, does not constitute "a reasonable attorney's fee," within the meaning of the Act as properly construed. Bonus awards are not authorized by the Act and are inconsistent with its limited purposes. Rather than simply compensate plaintiffs' counsel for the reasonable cost of the litigation, such bonuses constitute a windfall to plaintiffs' counsel, which Congress expressly sought to avoid. (Pp. 19-47.)

Although plaintiffs were represented by a publicly-funded legal services organizaton, they were compensated at hour-

ly rates based on those charged by private, profit-making law firms with high overhead expenses. Application of "market" rates in computing fees for attorneys employed by legal services organizations results in windfalls to such organizations which are inconsistent with the language and purpose of the Act. To avoid such windfalls, hourly rates of legal services attorneys should be based on the salaries and overhead actually incurred by the organization in question. A cost-based method not only is more consistent with the meaning and intent of the Act but also is easier to apply than a market-based method. (Pp. 47-64.)

ARGUMENT

I. THE FEE AWARD IN THIS CASE EXCEEDS "A REASONABLE ATTORNEY'S FEE" WITHIN THE MEANING AND INTENT OF 42 U.S.C. § 1988 AS PROPERLY CONSTRUED.

The issue presented by this appeal is one of statutory construction--what constitutes "a reasonable attorney's fee" under 42 U.S.C. § 1988, and how should the amount of such a fee be determined. Since the statute itself provides no express answer to these questions (other than to mandate that fee awards be "reasonable"), it is necessary to construe the statute in light of its legislative history and purpose and in accordance with other general principles of statutory interpretation.

In applying a generally worded or ambiguous statute, it is necessary and appropriate for courts to be guided by the

reasons underlying the statute's enactment. United States v. Kimbell Foods, Inc., 440 U.S. 715, 738 (1979). This rule of statutory construction is particularly applicable to the Act, whose sparse language is explicated by an unusually ample legislative history.

The Act was passed in direct response to this Court's decision in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), which held that federal courts do not have the power to award attorney's fees to a prevailing party without express statutory authorization.[4/] Id. at 269. Prior to Alyeska, federal courts had been awarding at-

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4/ S. Rep. No. 1011, 94th Cong., 2d Sess. 1, 4 (1976), reprinted in 1976 U.S. Code Cong. & Ad. News 5908; H.R. Rep. No. 1558, 94th Cong., 2d Sess. 2 (1976); 121 Cong. Rec. 26,806 (1975) (Tunney); 122

(footnote continued)

torney's fees to the prevailing party in civil rights cases on the theory that, in instituting such cases, plaintiffs serve in the capacity of "private attorneys general," seeking to vindicate constitutional rights, not for themselves alone, but also for the benefit of others similarly situated.[5/] By holding that the federal courts lack authority to award fees under such circumstances, Alyeska "created anomalous gaps in our civil rights laws," S. Rep. at 4, which the Act was intended to fill.[6/]

(footnote continued)

Cong. Rec. 31,471 (Mathias), 35,122 (Sieberling), 35,124 (Railsback), 35,125-26 (Kastenmeier) (1976).

5/ See S. Rep. at 4 n. 3; see also H.R. Rep. at 2.

6/ 122 Cong. Rec. 35,122 (Sieberling), 35,126 (Fish) (1976); 121 Cong. Rec.

(footnote continued)

As a "narrowly drawn" response to Alyeska, 122 Cong. Rec. 35,126 (1976) (Kastenmeier), this legislation was not intended as a wholesale abrogation of the "American Rule" that each party bear his own litigation costs,[7/] but rather, was viewed by its proponents as "only a beginning of our response to the Alyeska case . . . [,] only a first step and a rather limited and cautious one." 122 Cong. Rec. 35,126 (1976) (Kastenmeier).

(footnote continued)

26,806 (1975) (Tunney); S. Rep. at 6 ("This bill creates no startling new remedy--it only . . . [allows] Federal courts . . . to continue the practice of awarding attorneys' fees which had been going on for years prior to [Alyeska] . . . .").

7/ That common-law rule had previously been recognized by this Court. See, e.g., Alyeska, 421 U.S. at 271 (American Rule described as "deeply rooted in our history"); Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717-18 (1967); Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796).

Congress enacted the Fees Act in order to permit private enforcement of civil rights laws to continue as it had prior to Alyeska. The Act was thus intended to remove financial barriers that would otherwise prevent access to the courts by disadvantaged plaintiffs acting in the role of private attorneys general,[8/] by affording successful civil rights plaintiffs "the opportunity to recover what it costs them to vindicate these rights in court" (emphasis added). 121

8/ 122 Cong. Rec. 31,471 (Mathias) ("The goal of [the Act] is . . . to insure that the high cost of litigation does not bar the Federal courts to citizens who seek to enforce their rights under our civil rights laws. . . . [Alyeska] has erected a formidable financial barrier against those seeking access to Federal courts."), 31,472 (Kennedy), 35,118, 35,128 (Sieberling), 35,126 (Fish) (1976); H.R. Rep. at 1, 2-3, 6; S. Rep. at 2, 3, 6.

Cong. Rec. 26,806 (1975) (Sen. Tunney); H.R. Rep. at 2.[9]

The proponents of the Act repeatedly emphasized its limited purpose by reiterating that the Act was not intended to "aid[] lawyers," 122 Cong. Rec. 33,314 (1976) (Kennedy),[10] to encourage meritless litigation,[11] or to provide "windfalls" to prevailing counsel.[12] Rather, Congress stressed the moderate

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9/ See also 122 Cong. Rec. 35,118 (1976) (Sieberling) (bill will enable successful plaintiffs "to get compensation for their legal expenses").

10/ See also 122 Cong. Rec. 35,127 (Jordan) ("This is not . . . a food-stamp bill for lawyers. It is not going to work that way."), 35,128 (Sieberling) ("not a lawyers' bill") (1976).

11/ 121 Cong. Rec. 26,806 (1975) (Tunney) ("Bill would do nothing to encourage frivolous or bad faith litigation"); 122 Cong. Rec. 35,127 (Jordan), 35,128 (Sieberling) (1976); H.R. Rep. at 7.

12/ H. R. Rep. at 9; S. Rep. at 6.

approach taken by the Act, of authorizing the courts, in their discretion, to award a "reasonable" attorney's fee to prevailing parties in civil rights cases.[13/] As will be shown in sections II and III, the fee award in this case and the methods by which it was computed are contrary to these limited Congressional purposes.

A narrow interpretation of § 1988 is also required by the well-established rules that statutes in derogation of the common law or of a state's sovereign immunity be strictly construed. Since the Fees Act falls into both of these cate-

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13/ Congress contrasted the moderate approach of this Act with the more liberal approach of other statutes providing for mandatory fee awards or awards to non-prevailing parties. H.R. Rep. at 6-9. See also 122 Cong. Rec. 35,115-17 (Anderson and Railsback), 35,122-23 (Sieberling) (1976).

gories, a narrow reading of that statute is particularly appropriate.

This Court has often stated that statutes in derogation of the common law must be strictly construed.[14/] As discussed above, the Fees Act constitutes a narrow exception to the common-law American Rule against fee-shifting. Therefore, as a statute in derogation of the common law, it should be "given the effect which makes the least rather than the most change in the common law." 3

14/ See, e.g., Brown v. Barry, 3 U.S. (3 Dall.) 365, 367 (1797) (act . . . in derogation of the common law . . . is to be taken strictly"); Shaw v. R.R. Co., 101 U.S. 557, 565 (1879) ("No statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express."); Herd & Co. v. Krawill Mach. Corp., 359 U.S. 297, 304-05 (1959) (same).

C. Sands, Sutherland Statutory Construction § 61.01 (4th ed. 1974).

Moreover, the Act also constitutes an abrogation of the states' sovereign immunity under the Eleventh Amendment. Hutto v. Finney, 437 U.S. 678, 693-94 (1978); Maher v. Gagne, 448 U.S. 122, 132-33 (1980). It is well-settled that waivers of sovereign immunity must be "construed strictly in favor of the sovereign," McMahon v. United States, 342 U.S. 25, 27 (1951), and not "enlarge[d] . . . beyond what the language requires." Eastern Transportation Co. v. United States, 272 U.S. 675, 686 (1927).

This Court recently applied this general rule as a rationale for narrowly interpreting another statute permitting awards of fees against the United States. Ruckelshaus v. Sierra Club, 51 U.S.L.W. 5132, 5133 (U.S. July 1, 1983). More-

over, in the very case which held that the Eleventh Amendment does not constitute an absolute bar to fee awards against the states, this Court cautioned that "the Eleventh Amendment . . . may counsel moderation in determining the size of the award," Hutto v. Finney, 437 U.S. at 692, n. 18, particularly where, unlike in that case, the amount of the award is "so large or so unexpected that it interfere[s] with the State's budgeting process." Id.[15/]

As will be shown in the succeeding sections, the courts below violated not

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15/ See also Case Comment, Statutory Non-Civil Rights Violations of Section 1983 and Awards of Attorneys' Fees After Maine v. Thiboutot, 61 B.U.L. Rev. 1069, 1091 (1981) ("[T]he prospect of wide-ranging awards of fees against states counsels hesitation in light of concerns for state sovereignty embodied both in the eleventh amendment and in general notions of federalism.").

only the legislative intent of § 1988 but also well-established principles of statutory construction by construing the statute to permit a fee award which must be characterized as unreasonable in amount and in method of computation and, as such, as an unfair windfall to plaintiffs' counsel, neither authorized nor intended by § 1988 as properly construed.

II. THE 50 PERCENT BONUS AWARD IMPOSED BY THE LOWER COURTS CONSTITUTES A WINDFALL TO PLAINTIFFS' COUNSEL, NOT AUTHORIZED OR INTENDED BY SECTION 1988.16/

Although the awarding of bonuses over and above the "lodestar" amount (reasona-

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16/ For the reasons set forth in this section, the amicus respectfully suggests that this Court reconsider its dicta in Hensley v. Eckerhart, 103 S. Ct. 1933, 1940 (1983), that bonus awards may be permissible "in some cases of exceptional success."

ble number of hours expended times reasonable hourly rate) has become commonplace under § 1988,[17] the concept of such bonuses is nowhere mentioned in the statute itself or in its comprehensive legislative history. Rather, the statute itself is silent as to the means by which "a reasonable attorney's fee" should be determined, and the legislative history provides little additional guidance other than to indicate "that awards are to be 'reasonable'," H.R. Rep. at 6, and "adequate to attract competent counsel." S. Rep. at 6.

The Senate Report indicates that the amount of fees awarded under § 1988 is to "be governed by the same standards which prevail in other types of equally

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17/ See Leubsdorf, The Contingency Factor in Attorney Fee Awards, 90 Yale L.J. 473 (1981).

complex Federal litigation," and that the "appropriate standards" are those set forth in Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974), and "correctly applied in such cases as Stanford Daily v. Zurcher, 64 F.R.D. 680 (N.D. Cal. 1974); Davis v. County of Los Angeles, 8 E.P.D. ¶ 9444 (C.D. Cal. 1974); and Swann v. Charlotte-Mecklenburg Board of Education, 66 F.R.D. 483 (W.D. N.C. 1975)." S. Rep. at 6.

However, citation of these four cases provides no real guidance as to the intended method of calculating fees, since each of these cases employed different methodologies. The Johnson case merely listed twelve guidelines to be used by the district court in reconsidering the amount of its fee award, 488 F. 2d at 717-19; the court "voice[d] no observation or intimation as to the correctness

of the amount awarded." Id. at 720. Moreover, the Johnson court provided the following caveat to the application of these guidelines:

> [C]ourts must remember that they do not have a mandate . . . to make the prevailing counsel rich. . . . The statute [Title VII] was not passed for the benefit of attorneys but to enable litigants to obtain competent counsel . . . and to fairly place the economical burden of Title VII litigation. Id. at 719.

The Swann case listed nine "[p]ertinent factors in fixing fees," some the same as and some different from those listed in Johnson, 66 F.R.D. at 484-86, and then simply stated the amount of the award, without explaining how that amount was calculated.[18/] Id. at 486. The

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18/ The amount awarded was substantially less than that requested by plaintiffs.

(footnote continued)

Davis case also recited some but not all of the Johnson criteria, 8 E.P.D. at 5048, and then simply stated the amount of the award arrived at by "balanc[ing] the many relevant factors in as fair a way as possible." Id. at 5049. The Stanford Daily case applied "many of the factors listed in Johnson within a modified version of the framework offered in Lindy Brothers [Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3rd Cir. 1973) (Lindy I)]."[19/] 64 F.R.D. at 682.

(footnote continued)

The court explained the reduction by stating that although "[a]n award of fees in [the] amount [requested] would be reasonable, . . . I would prefer to err on the conservative side . . . because I do not wish to contribute unnecessarily to the overpricing of litigation in this or any other court." Id. at 486.

19/ The Stanford Daily court found the Johnson test lacking in that "the Fifth

(footnote continued)

The Stanford Daily case is the only one of those cited with approval in the Senate Report, at 6, which awarded a bonus over and above the lodestar amount. However, the Stanford Daily court expressed reservations about this method of computing fee awards, supra note 19, and the amount of the bonus actually awarded in that case ($1,000), 64 F.R.D. at 687-88, was negligible by today's standards.

The citation of these four cases and the legislative history as a whole thus

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(footnote continued)

Circuit's opinion does not indicate how a district court is to use the list, how a court is to attach a relative weight to the different factors in determining an award." 64 F.R.D. at 682. The Lindy ("lodestar") method was found to be lacking as well, since "[t]he variable factors [used to compute any bonus award] . . . oftentimes will be interrelated [and, therefore,] might unintentionally . . . lead to an unnecessary inflation of the attorneys' fees award." Id.

falls far short of evincing clear Congressional support for the use of bonuses in computing fee awards.[20] Rather, the concept of bonus awards was entirely a judicial creation, conceived in contexts that are entirely inapposite to the application of section 1988.

The concept originated in antitrust cases resulting in the creation of an equitable fund out of which both plaintiffs and their counsel recover.[21] In awarding fees in such cases, "the

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20/ The Sixth Circuit has rejected the use of bonuses on this and other grounds. See Oliver v. Kalamazoo Bd. of Educ., 576 F.2d 714, 715 (6th Cir. 1978); Northcross v. Bd. of Educ., 611 F.2d 624, 638 (6th Cir. 1979), cert. denied, 447 U.S. 911 (1980).

21/ See, e.g., Lindy I; Lindy Bros. Builders, Inc. v. Am. Radiator & Standard Sanitary Corp., 540 F.2d 102 (3rd Cir. 1976) (Lindy II); City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974).

court exercises its equitable jurisdiction over the relationship between an attorney and his amorphous client." Prandini v. National Tea Co., 557 F. 2d 1015, 1020 (3rd Cir. 1977). The rationale for fee awards in such cases is one of quantum meruit--"the members of the [benefited] group should pay 'compensation as was reasonable' . . . to the attorney representing their interests," Grinnell, 495 F.2d at 469; Lindy I, 487 F.2d at 165. Under that theory, bonus awards make sense and are easily implemented, particularly where the case has created a large monetary fund out of which the award will be paid.[22/] Cf. Oliver v. Kalamazoo

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22/ Even in such cases, courts have a duty "to protect against 'vicarious gen-

(footnote continued)

Board of Education, 576 F.2d at 715 (where no large monetary recovery, multiplier inappropriate).

By contrast, fee awards under § 1988 are paid by the defendant in addition to any other judgment against him. Since the defendant is not the one who benefited from the action, the quantum meruit theory cannot be used to justify inflated awards in such cases. Nor can a bonus in such cases be characterized as part of defendant's equitable "punishment" for legal wrongs against the plaintiffs, since, under § 1988, unlike in the anti-

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(footnote continued)

erosity' . . . [so that] a successful plaintiff does not have its treble damage recovery unduly diminished by the payment of fees to its attorneys." Int'l Travel Arrangers, Inc. v. W. Airlines, Inc., 623 F.2d 1255, 1274-76 (8th Cir.), cert. denied, 449 U.S. 1063 (1980) (multiplier struck down on that ground).

trust cases, fees must be paid in addition to the relief on the merits, rather than out of it.[23]

An additional significant difference between fee awards in antitrust cases and those in § 1983 actions is that, in the latter, the fee award must be paid by a state or other public entity rather than by a private defendant. The state, unlike a private defendant, is a representative of the public interest; and the taxpayers who ultimately bear the burden of such awards are not guilty of any wrongdoing. Extra caution is therefore warranted in assessing the amount of the award so as not to disrupt state and lo-

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23/ See Berger, Court Awarded Attorneys' Fees: What Is "Reasonable"?, 126 U. Pa. L. Rev. 281, 317-18 (1977); see also Hutto v. Finney, 437 U.S. at 695 (fee award under § 1988 not intended to "compensate the plaintiff for the injury that first brought him into court").

cal governments or unduly reduce the amount of money available for other public purposes.[24/] Since the rationales underlying bonus awards have no application in the context of § 1988, the adoption of this mechanism into the calculation of fees under § 1988 is not warranted.

Moreover, bonus awards are entirely inconsistent with the purposes of § 1988. First of all, bonuses are, by definition, "windfalls" to plaintiffs' counsel, since bonuses are awarded in addition to "compensation for [plaintiffs'] legal expens-

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24/ See supra note 15 and accompanying text; see also Oliver v. Kalamazoo Bd. of Educ., 576 F.2d at 716-18 (Weick, J., concurring) (100% bonus "not only excessive, but . . . unconscionable as well" where fee to be paid by state taxpayers); Keyes v. School Dist. No. 1, 439 F. Supp. 393, 414-15 (D. Colo. 1977); Thomas v. Bd. of Educ., 505 F. Supp. 102, 104 (N.D. N.Y. 1981); Brewster v. Dukakis, 544 F. Supp. at 1082.

es," which is all that Congress intended to provide.[25] As noted by the Sixth Circuit, "[m]ultiplying the number of hours properly spent times a reasonable hourly rate is sufficient to serve [the] goal" of attracting competent counsel. Oliver v. Kalamazoo Board of Education, 576 F.2d at 716. Anything more than that is simply "unearned personal gain at the public expense," Northcross v. Board of Education, 611 F.2d at 638, or, in other words, a "windfall."[26]

25/ See supra notes 8 and 9 and accompanying text; see also S. Rep. at 6 ("counsel . . . should be paid, as is traditional with attorneys compensated by a fee-paying client, 'for all time reasonably expended on a matter'").

26/ Id; see also Berger, supra note 23, at 292, 317-18, 324 n. 167; Rowe, The Legal Theory of Attorney Fee Shifting: A Critical Overview, 1982 Duke L.J. 651, 675.

Second, even where some rationale is given for awarding a bonus,[27] the amount of the bonus awarded is entirely arbitrary,[28] thus violating Congress's mandate that fee awards be "reasonable." Even courts that have endorsed the use of bonuses have commented on the subjectivity of arriving at a precise amount.[29] The arbitrary nature of such awards is exacerbated by the fact that a difference between a bonus of, e.g., 10% and one of 25% can result in a

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27/ As discussed infra at 33-46, the rationales relied on in this and other cases are actually inconsistent with the purposes of § 1988.

28/ See, Berger, supra note 23, at 290.

29/ See, e.g., Nat'l Ass'n of Concerned Vets v. Sec'y of Defense, 675 F.2d 1319, 1328 (D.C. Cir. 1982) (amount of bonus "inherently imprecise"); Foster v. Gloucester County Bd. of Chosen Freeholders, 465 F. Supp. 293, 302 (D. N.J. 1978).

difference of hundreds of thousands of dollars in a protracted case.[30] The lack of consistency and predictability of bonus awards is directly contrary to Congress's purpose of ensuring uniformity and consistency in fee awards.[31] Furthermore, as a practical matter, the unpredictability of bonus awards makes it difficult for the parties to settle fee claims, since the prospect of bonus awards makes it impossible to estimate, with any degree of accuracy, the total amount of fees a court would be likely to award in a particular case.[32] Fi-

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30/ See Berger, supra note 23, at 291.

31/ See 122 Cong. Rec. 35,118, 35,122 (Sieberling) (1976); H.R. Rep. at 1.

32/ Cf. Hensley v. Eckerhart, 103 S. Ct. at 1941 ("A request for attorney's fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee.").

nally, the exorbitant fee awards that result from the use of bonuses certainly cannot be characterized as "reasonable" in amount.[33/]

An examination of the justifications offered by courts in support of bonus awards reveals that those justifications are, in fact, fallacious and inconsistent with the overall purposes of the Act.

The primary justification used to support bonus awards, including the bonus awarded in this case, is that a bonus is necessary to account for the contingent nature of success, often termed the "risk

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33/ The size of such awards has brought harsh criticism from members of the public as well as the bench and bar. See Berger, supra note 23, at 292 and n. 55; Alpine Pharmacy, Inc. v. Pfizer, 481 F.2d 1045, 1050 (2d Cir.), cert. denied, 414 U.S. 1092 (1973) ("lucrative fees involved in recent class actions may evoke public acceptance of an Italian proverb, 'A lawsuit is a fruit tree planted in a lawyer's garden'").

of loss" or the "contingency factor." The roots of this concept can be found in the contingent fee agreements that often obtain between tort plaintiffs and their attorneys. In those circumstances, a contingent fee arrangement has "an economic rationale: it compensates plaintiff's lawyer for his services as an entrepreneur who bears the risk of litigation." Leubsdorf, supra note 17, at 480. By taking a number of cases on a contingency basis, plaintiff's counsel can use the large fees recovered in successful cases to cover the losses he incurs in unsuccessful ones. Such arrangments thus have the purpose and effect of financing not only meritorious but also losing cases.[34/] Such a purpose and effect are

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34/ Copeland v. Marshall, 641 F.2d 880, 913 (D.C. Cir. 1980) (Copeland III) (Wil-
(footnote continued)

entirely inconsistent with those of Congress in enacting § 1988. Congress intended the Act to encourage and provide compensation only for meritorious cases,[35] certainly not for losing cases[36] nor even for cases that have a

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(key, J. dissenting); Leubsdorf, supra note 17, at 474 ("The current theory of contingency bonuses implies that lawyers and clients should be made as willing to bring a feeble suit as a promising one"); id. at 491-92.

35/ 122 Cong. Rec. 35,118 (Sieberling) ("provide for . . . compensation . . . in meritorious cases"), 35,127 (Jordan) ("access to the system of justice to everyone . . . if he does, in fact, have a meritorious claim"), 35,128 (Sieberling) ("meritorious . . . deserving cases") (1976).

36/ 121 Cong. Rec. 26,806 (1957) (Tunney) ("act would do nothing to encourage frivolous litigation"); Ruckelshaus v. Sierra Club, 51 U.S.L.W. at 5133 ("successful party need not pay its unsuccessful adversary's fees").

reaonable chance of success, but do not ultimately succeed.[37]

In fact, Congress intended the Act to deter meritless suits.[38] As this Court said recently with respect to another fee statute, "One might well imagine the surprise of the legislators who voted for this section as an instrument for deterring meritless suits upon learning that instead it could be employed to fund such suits." Ruckelshaus v. Sierra Club, 51 U.S.L.W. at 5135.

37/ Hensley v. Eckerhart, 103 S. Ct. at 1946 (Brennan, J., concurring in part, dissenting in part); Furtado v. Bishop, 84 F.R.D. 671, 677 (D. Mass. 1979) ("There must be an element of reason; the fee must not be such as to encourage the overpressing of marginal claims"), rev'd, 635 F.2d 915 (1st Cir. 1980); H.R. Rep. at 6-8.

38/ S. Rep. at 5; Grubbs v. Butz, 548 F.2d 973, 975 (D.C. Cir. 1976); Hensley v. Eckerhart, 103 S. Ct. at 1946 (Brennan, J., concurring in part, dissenting in part); Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 419-20 (1978).

As pointed out by one commentator, ignoring the contingency factor is more consistent with Congressional intent: "Putting the lawyer to the risk in close cases helps weed out meritless claims . . . [and] provide[s] a desirable check on the . . . increase in court docket congestion."[39/] Moreover, "[i]f [unsuccessful] litigation is to be subsidized, one may well ask why the subsidy should come from the defendant in another case." Leubsdorf, supra note 17, at 488-89.

Contingency bonuses have the further untoward effect of rewarding, and hence encouraging, marginal claims to an even greater extent than clearly successful

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39/ Note, Promoting the Vindication of Civil Rights Through the Attorney's Fees Awards Act, 80 Colum. L. Rev. 346, 375 (1980).

ones, since the amount of a contingency bonus varies inversely with the strength of plaintiff's claim.[40] Awarding bonuses on this basis is patently unfair to defendants, since such awards have the converse effect of forcing defendants to pay higher attorney's fees where they had a strong, but ultimately unsuccessful, defense than where their violations of plaintiffs' rights were clear from the outset.[41] Such awards cannot serve to deter egregious civil rights violations by potential defendants, one of the

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40/ See, e.g., City of Detroit v. Grinnell Corp., 495 F.2d at 471 ("[t]he greater the probability of success . . . the less this consideration should serve to amplify the basic . . . fee"); Prandini v. Nat'l Tea Co., 557 F.2d at 1020.

41/ Leubsdorf, supra note 17, at 488-89.

subsidiary purposes of the Act,[42] since defendants are "penalized" only where it is unclear, prior to litigation, that their conduct is, in fact, illegal.[43]

In addition, in opposing contingency bonuses, defendant's counsel is put in the awkward and unseemly position of arguing that defendant's liability was so clear from the outset that there was little or no risk of loss.[44] Courts, as

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42/ See, e.g., 122 Cong. Rec. 31,471 (1976) (statement of Sen. Scott) (Act will help eradicate discrimination); S. Rep. at 5 ("fee awards . . . secur[e] compliance with [civil rights] laws"); Copeland III, 641 F.2d at 896.

43/ Rowe, supra note 26, at 656, 676 n. 115; Leubsdorf, supra note 17, at 490; Note, supra note 39, at 375; Hughes v. Repko, 578 F.2d 483, 491 (3rd Cir. 1978) (Garth, J., concurring).

44/ See Aumiller v. Univ. of Del., 455 F. Supp. 676, 683 (D. Del. 1978), aff'd,

(footnote continued)

well, are put in the difficult, if not impossible, position of retrospectively assessing the initial likelihood of success in a case which they have already decided in plaintiff's favor.45/

Finally, to the extent that contingency bonuses are intended to protect plaintiff's counsel against the risk of nonpayment for their services, such bonuses are inappropriate where, as here, plaintiffs are represented by a legal services organization which never receives payment from its clients and whose

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(footnote continued)

594 F.2d 854 (3rd Cir. 1979); Gonzales v. Van's Chevrolet, Inc., 498 F. Supp. 1102, 1106 (D. Del. 1980); Leubsdorf, supra note 17, at 483-84.

45/ See Nat'l Ass'n of Concerned Vets v. Sec'y of Defense, 675 F.2d at 1328; Copeland III, 641 F.2d at 893; Berger, supra note 23, at 292; Leubsdorf, supra note 17, at 474.

funding is not contingent on whether it prevails in individual cases. Such attorneys "cannot truly be said to have undertaken a risk of no remuneration." Vecchione v. Wohlgemuth, 481 F. Supp. 776, 795 (E.D. Pa. 1979). As aptly stated by one commentator,

> If an organization is not permitted to charge its clients for its services . . . what does that organization risk in undertaking representation in one of the few types of cases which permit recovery of a fee? . . . [L]itigation which permits the collection of a fee by a federally funded legal services organization is actually the most lucrative type of litigation available to such organizations.46/

For this reason, a number of courts, including the Second Circuit in another recent case, have refused to award con-

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46/ Comment, Calculation of a Reasonable Award of Attorneys' Fees Under the Attorneys' Fees Awards Act of 1976, 13 J. Mar. L. Rev. 331, 369-70 and n. 189 (1980).

tingency bonuses to legal services attorneys.[47/]

Nor can contingency bonuses to legal services attorneys be justified on other grounds. Such bonuses cannot operate as an incentive for such groups to take more civil rights cases, cf. Rodriguez v. Taylor, 569 F.2d 1231, 1245 (3rd Cir. 1977), cert. denied, 436 U.S. 913 (1978), since an Internal Revenue Service ruling prohibits public interest law firms seeking tax-exempt status from "us[ing] the likelihood or probability of a fee award as a consideration in its selection of cas-

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47/ See, e.g., NYSARC v. Carey, 52 U.S. L.W. 2015, 2016 (2d Cir. June 15, 1983); Cole v. Tuttle, 462 F. Supp. 1016, 1019 (N.D. Miss. 1978); Keyes v. School Dist. No. 1, 439 F. Supp. at 414; McCormick v. Attala Bd. of Educ., 424 F. Supp. 1382, 1388 (N.D. Miss. 1976); Barrett v. Kalinowski, 458 F. Supp. 689, 708 (M.D. Pa. 1978); see also Rowe, supra note 26, at 670.

es." Rev. Proc. 75-13, § 3, 1975-1 Cum. Bull. 662. Furthermore, no additional incentive is needed to induce such organizations to take on such cases, since "[t]hese organizations exist to represent groups like the [plaintiff] class, with constitutional claims at the cutting edge of the law." NYSARC v. Carey, 52 U.S. L.W. at 2015-16. Nor should contingency bonuses be used as an indirect means of funding legal services organizations. Compare Copeland III, 641 F.2d at 899 with id. at 920 n. 32 (dissent). This Act was not intended for that general purpose, see Comment, supra note 46, at 362-63, 395, but rather, only to finance successful civil rights cases, and there is no guarantee that bonuses received by legal services organizations will be used for that limited purpose. Thus, contingency bonuses to legal services attor-

neys, which serve none of the purposes of § 1988, must be characterized as impermissible windfalls to such organizations.

Other rationales, in addition to contingency, used by the lower courts in this and other cases to justify bonus awards, include the complexity of the case and the quality of the services provided by plaintiffs' counsel. Since the complexity of the case increases the number of hours reasonably spent, and the quality of representation increases the reasonable hourly rate used to compute the lodestar amount, a bonus supplementing the lodestar based on these factors necessarily constitutes a windfall, which should be disallowed.[48/]

48/ See Leubsdorf, supra note 17, at 487; Berger, supra note 23, at 317-38;

(footnote continued)

A bonus based on benefits obtained by the plaintiffs in the underlying case is also contrary to the purposes of the Act and unfair to the defendants. The basic fee award is designed to compensate plaintiffs to whatever extent that they prevail. See Hensley v. Eckerhart, 103 S. Ct. at 1940. A party who fully prevails will receive compensation for all time reasonably spent in doing so and, accordingly, will receive a higher fee than one whose success is limited. Id. An additional bonus for success can only constitute a windfall. Moreover, the amount of a bonus based on results is likely to be arbitrary, particularly in

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(footnote continued)

Hensley v. Eckerhart, 103 S. Ct. at 1940 n. 9; Donnell v. United States, 682 F.2d 240, 253-54 (D.C. Cir. 1982), cert. denied, 103 S. Ct. 1190 (1983); Copeland III, 641 F.2d at 890.

nonmonetary cases where the results are difficult to translate into quantitative terms. Berger, supra note 23, at 316. Finally, such a bonus is unfair to defendants, since they have already "paid" for the results of their wrongdoing via the relief awarded against them on the merits. To "punish" them again by supplementing the fee award is contrary to the compensatory, nonpunitive purpose of the Act. Id; see also Hutto v. Finney, 436 U.S. at 695.

For all of the reasons discussed in this section, bonus awards in general, and in this case in particular,[49/] are inconsistent with the purposes of § 1988. Rather than merely compensate plaintiff's

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49/ In addition to the general reasons discussed above, the bonus award here is

(footnote continued)

counsel for their legal expenses in prosecuting a particular civil rights case, all that the Act intended, bonus awards constitute windfalls to plaintiffs' counsel, which are not permitted under the Act as properly construed.

III. COMPENSATING LEGAL SERVICES ORGANIZATIONS AT RATES CHARGED BY PROFIT-MAKING PRIVATE FIRMS CONSTITUTES A WINDFALL TO SUCH ORGANIZATIONS NOT AUTHORIZED OR INTENDED BY SECTION 1988; A COST-BASED APPROACH IS MORE CONSISTENT WITH LEGISLATIVE INTENT AND EASIER TO APPLY.

The lower courts in this case awarded fees to plaintiffs' counsel, publicly-

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(footnote continued)

particularly inappropriate for the following specific reasons: the quality of representation and complexity of the case were already fully accounted for in the high hourly rates ($95-$105) awarded and large number of hours (769.75) found to be reasonably spent; this case, which was

(footnote continued)

funded legal services organization, at the rate of $95 to $105 per hour, "the rate[s] charged for similar work by [private] attorneys of like skill in the area." Petition, App. 2a, 8a. As will be shown in this section, and as subsequently recognized by the Second Circuit in another case, awarding fees to legal services attorneys at "market" rates "constitute[s] a substantial windfall for

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(footnote continued)

decided entirely on statutory, non-civil-rights grounds did nothing to foster the "basic" and "fundamental" constitutional rights that the Act was primarily intended to protect, see Case Comment, supra note 15; Hughes v. Repko, 578 F.2d at 488-89; the actual financial benefit to the members of the plaintiff class is purely speculative at this point, Beazer v. N.Y.C. Transit Auth., 558 F.2d 97, 100 (2d Cir. 1977), rev'd on other grounds, 440 U.S. 568 (1979); and the courts below failed to make the required specific factual findings explaining the bonus award. Hensley v. Eckerhart, 103 S. Ct. at 1942; Lindy II, 540 F.2d at 117-18; Lindy I, 487 F.2d at 169.

the organizations involved" and therefore should not be permitted under § 1988.[50/]

A proper determination of what constitutes a "reasonable" hourly rate for legal services attorneys must begin, again, with an examination of the language of the Act and its legislative history. The Act itself provides some guidance by authorizing the award of "a reasonable attorney's fee as part of the

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50/ NYSARC v. Carey, 52 U.S.L.W. at 2015-16. See also Ramos v. Lamm, 52 U.S. L.W. 2015 (10th Cir. June 15, 1983); Copeland III, 641 F.2d at 908-28 (Wilkey, J., dissenting); Copeland v. Marshall, 594 F.2d 244 (D.C. Cir. 1978) (Copeland I); Greenspan v. Auto. Club, 536 F. Supp. 411 (E.D. Mich. 1982); Glover v. Johnson, 531 F. Supp. 1036, 1039-44 (E.D. Mich. 1982); Page v. Preisser, 468 F. Supp. 399 (S.D. Iowa 1979); Alsager v. Dist. Ct., 447 F. Supp. 572, 577-80 (S.D. Iowa 1977); Comment, supra note 46, at 378-400.

costs" (emphasis added).[51] The legislative history also repeatedly equates attorney's fees with the costs of litigation and emphasizes that the Act is intended to reimburse plaintiff's counsel

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51/ In Hutto v. Finney, 437 U.S. at 695 n. 24, this Court focused on the underscored language in emphasizing that a fee award under § 1988 is intended not to "compensate the plaintiff for the injury that first brought him into court," but rather, to "reimburse[] him for a portion of the expenses incurred in seeking prospective relief." Based in part on this important distinction between damages and attorney's fees, this Court held that fee awards under § 1988 are not barred by the Eleventh Amendment. Id. at 695. Conversely, to the extent that the fee awarded in the present case is more than sufficient to reimburse plaintiffs' counsel for the cost of litigating this case, the award is barred by the Eleventh Amendment.

The Eleventh Amendment is further implicated here by the fact that plaintiffs prevailed solely on a statutory, non-civil-rights claim, see Stenson v. Blum, 476 F. Supp. 1331, 1333 n. 1, 1343 n. 30 (S.D.N.Y. 1979) aff'd mem., 628 F.2d 1345 (2d Cir.), cert. denied, 449 U.S. 885 (1980), and that the district court made (footnote continued)

for the "cost" of vindicating plaintiff's civil rights in court.[52]

The legislative history further indicates that the Act was intended primarily to encourage private attorneys to take civil rights cases,[53] although the House Report indicates, in a footnote, that "a prevailing party is entitled to

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(footnote continued)

no ruling as to the substantiality of plaintiffs' constitutional claims. Cf. Maher v. Gagne, 448 U.S. at 131-32 ("no need to reach the question whether a federal court could [within the parameters of the Eleventh Amendment] award attorneys fees against a State based on a statutory non-civil-rights claim," since that case involved a substantial constitutional claim).

52/ See supra notes 8 and 9 and accompanying text. See also Alsager v. Dist. Ct., 447 F. Supp. at 577 ("Nothing . . . indicates that the purpose of the statute was other than reimbursement for costs and time spent."); Page v. Preisser, 468 F. Supp. at 402-03.

53/ See H.R. Rep. at 2-3; Alsager v. Dist. Ct., 447 F. Supp. at 577.

counsel fees even if represented by an organization." Id. at 8 n. 16. In this regard, it is also significant to note that what Congress considered "the appropriate standards" for computing the amount of a reasonable fee, S. Rep. at 6, were formulated with a private practitioner in mind.[54/] Accordingly, courts have often recognized that many of these criteria are patently inapplicable to legal services attorneys.[55/] The cases cited by the Senate Report, at 6, as correctly applying these standards are of little help with respect to legal

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54/ See Johnson, 488 F.2d at 719 (enumerated criteria derived from those established by the ABA for setting fees to be paid to private attorneys by their clients); see also Hensley v. Eckerhart, 103 S. Ct. at 1937 n. 3 (Johnson factors "derive directly from" ABA Code of Professional Responsibility).

55/ See, e.g., Armstrong v. Reed, 462 F. Supp. 496, 502 and n. 5 (N.D. Miss. 1978); Keyes v. School Dist. No. 1, 439 F. Supp. at 414.

services attorneys, since only one of these cases, Davis v. County of Los Angeles, involved a public interest law firm, and there is no indication in that case of whether or not the rates at which fees were awarded ($35-$60 per hour) were based on the rates charged by private attorneys in the community. Rather, the Davis court merely indicated that "such law firms [should] be awarded reasonable attorneys' fees to be computed in the traditional manner." Id.

As noted by the Second Circuit in another case, the Senate Report's recognition of equivalence, in terms of complexity, between civil rights cases and other types of federal litigation "does not necessarily imply equivalent fees for profit-making and non-profit attorneys." NYSARC v. Carey, 52 U.S.L.W. at 2016. Nor is the Senate Report's comment that "counsel . . . should be paid, as is tra-

ditional with attorneys compensated by a fee-paying client, 'for all time reasonably expended on a matter,'" S. Rep. at 6, of any guidance in computing hourly rates, since that comment and the quotation contained therein were addressed to the issue of hours not rates.[56] Thus, the legislative history falls far short of mandating that legal services attorneys be compensated at "market" rates.[57]

56/ See Davis v. City of L.A., 8 E.P.D. at 5049.

57/ Even if Congressional endorsement of the market-rate system could be inferred from the legislative history, the escalating rates that have resulted from its application requires a reexamination of that system in light of the overall purposes of § 1988. See Copeland III, 641 F.2d at 908, 910 (dissent) ("path of attorney's fees [under market-rate system] . . . is Up, Up, and Away! . . . [S]pecific situations which arise in future cases will sometimes bring to light deficiencies in the general rules laid down in the past . . . .").

What the legislative history does unequivocally demonstrate is Congress's intent that, however fees are computed under the Act and to whomever they are awarded, the amount of such fees should not be such as to constitute a windfall to prevailing counsel.[58] A close examination of the market-rate system of computing hourly rates for legal services attorneys applied in this case reveals that it is contrary to that clear legislative intent.

As several courts and commentators have recognized, assigning "market" rates to legal services attorneys presents difficult, if not insurmountable, problems. First of all, to state the obvious, there is no true "market" for the services of

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58/ See supra note 12 and accompanying text.

legal services attorneys, since they receive no fees from their clients.[59] Particularly since minimum fee schedules may no longer be used, Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), rates vary widely within communities and even within individual law firms,[60] depending on factors having no necessary relationship with the value of the services rendered or the experience and skill of the attorneys involved, for example, the attorney's relationship with a particular client, what that client can af-

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59/ See Copeland III, 641 F.2d at 913 (dissent); NYSARC v. Carey, 52 U.S.L.W. at 2016; Glover v. Johnson, 531 F. Supp. at 1040; Rodriguez v. Taylor, 569 F.2d at 1248.

60/ See Comment, supra note 46, at 378 (in cases decided between 1974 and 1979, hourly rates awarded to civil rights attorneys varied by 685 percent); Copeland III, 641 F.2d at 910 n. 3, 924 (dissent) ("'going hourly rate' . . . is itself an artificial construct").

ford to pay, the firm's overhead expenses, and how much profit the firm desires to make. Comment, supra note 00, at 385; Copeland III, 641 F.2d at 914, 924-25 (dissent); Rodriquez v. Taylor, 569 F.2d at 1247. Since such factors are unrelated to the value of a legal services attorney's services in a particular case, see Copeland III, 641 F.2d at 925 (dissent), assigning such an attorney a rate based on these factors is patently unreasonable and inconsistent with the legislative purpose of compensating civil rights attorneys only for the value of their services in a particular case.

More significant, in light of Congress's clear intent to avoid windfalls, is the fact that rates determined in this manner are likely to far exceed the legal service organizations' actual costs, since such rates are computed on the ba-

sis of the high overhead expenses and profit margins of private firms, which are not shared by legal services organizations. See NYSARC v. Carey, 52 U.S. L.W. at 2016. Any such excess is obviously a windfall to such organizations.[61/] Particularly where, as here, the party paying the fee is a state government, "the difference, if any, between the 'market value' fee and the 'compensation' fee would be better spent in remedying [the civil rights violation that gave rise to the action]." Glover v. Johnson, 531 F. Supp. at 1044.

61/ See supra note 50. Such a windfall cannot be justified as enabling legal services organizations to undertake other civil rights cases, cf. Palmigiano v. Garrahy, 616 F.2d 598, 602 (1st Cir.), cert. denied, 449 U.S. 839 (1980); Copeland III, 641 F.2d at 899, since the Act was not intended to serve that purpose, however benevolent. See supra at 43; see also Page v. Preisser, 468 F. Supp. at 403.

Although the market-rate system may have been adopted in order to avoid treating legal services organizations any differently from private attorneys, see, e.g., Palmigiano v. Garrahy, 616 F.2d at 601, that system, in effect, gives such publicly-funded counsel an unfair advantage over their private counterparts. As noted by one commentator:

> Requiring district courts to award identical gross fees to private and organizational counsel, notwithstanding the greater litigation expenses incurred by private counsel, would effectively award a higher return of profit to organizational counsel. Such a rule would lead a court to arbitrarily increase an otherwise reasonable award of attorney's fees simply because plaintiff's counsel happened to be employed by a legal services organization.

Comment, supra note 46, at 398. Such disparate treatment is not only unfair to the litigants on both sides of civil

rights cases, but is also directly contrary to "the spirit of 'reasonableness' which is the heart of section 1988." Id. "Legal services organizations, along with their counterparts in private practice, are not entitled to anything more than a reasonable fee under section 1988." Id. at 395.

In order to avoid windfalls to legal services attorneys, several courts, including the Second Circuit, have adopted an alternative method of computing hourly rates for legal services organizations, based on the actual litigation expenses of such organizations. Rather than arbitrarily assigning "market" rates to such attorneys, hourly rates are computed according to the salaries of the attorneys involved plus a percentage of the annual overhead of the organization, depending on the number of hours reasonably

spent by the organization's attorneys on the case.[62/]

This cost-based method has the advantages of more accurately reflecting the actual costs of vindicating a plaintiff's rights in a particular case, without compensating plaintiff's counsel for overhead and other expenses not actually incurred. See Page v. Preisser, 468 F. Supp. at 401. Such a system is consistent with the factors enumerated in Johnson v. Georgia Highway Express and endorsed by the Congress. An individual attorney's salary presumably reflects his relative skill and experience within the organization. Rodriguez v. Taylor, 569 F.2d at 1248. Other pertinent factors,

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62/ See NYSARC v. Carey, 52 U.S.L.W. at 2016; Glover v. Johnson, 531 F. Supp. at 1044; Alsager v. Dist. Ct., 447 F. Supp. at 579; Page v. Preisser, 468 F. Supp. at 402.

such as the novelty and complexity of the case, would still be reflected in the court's consideration of the number of hours reasonably spent. Moreover, it must be remembered that the Johnson criteria were intended only as guidelines and were not meant to be applied so as "to make the prevailing counsel rich." Johnson, 488 F.2d at 719.

In addition, a cost-based system is actually easier to administer than the more subjective and essentially arbitrary market-rate system. See Copeland III, 641 F.2d at 925-28 (dissent). The information needed to compute rates on this basis, i.e., attorneys' salaries and organizational overhead, is readily available, since legal services organizations are required under the Legal Services Corporation Act, 42 U.S.C. § 2996h(c)(1) and 45 C.F.R. § 1602, to report such in-

formation as a condition to their receipt of federal funding.[63/] Thus the Copeland court's primary basis for rejecting this system is unfounded. See Copeland III, 641 F.2d at 896 and n. 28. Furthermore, the objectivity of such information will facilitate settlement of fee claims by such organizations.

In sum, a cost-based system for determining reasonable hourly rates for legal services attorneys is consistent with

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63/ By contrast, under the market-rate system, prevailing counsel have the substantial burden of producing detailed and case-specific affidavits from community lawyers of similar experience and other expert testimony in order to establish an appropriate market rate for their services. See Berger, supra note 33, at 324; Comment, supra note 46, at 385; Nat'l Ass'n of Concerned Vets v. Sec'y of Defense, 675 F.2d at 1325 ("Setting a prevailing hourly rate has proven more difficult than perhaps may have been contemplated. . . . [G]eneralized and conclusory 'information and belief' affidavits from friendly attorneys . . . will not suffice.").

the language and intent of the Act and is certainly preferable to the subjective and inflationary market-rate analysis. Under a cost-based system, legal services attorneys receive full compensation for the cost of vindicating their clients' rights. They should not and cannot reasonably expect to receive more.

CONCLUSION

For all of the reasons discussed above, the Court should vacate the decision of the United States Court of Appeals for the Second Circuit and remand the case to that court for recomputation of a reasonable attorney's fee.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BARBARA BLUM,

Petitioner,

v.

ELLEN STENSON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC., MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, AMERICAN CIVIL LIBERTIES UNION, *AMICI CURIAE,* IN SUPPORT OF RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 81-1374

BARBARA BLUM,

Petitioner,

v.

ELLEN STENSON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC., MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, AMERICAN CIVIL LIBERTIES UNION, *AMICI CURIAE,* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICI* [1]

This brief is submitted on behalf of the NAACP Legal Defense and Educational Fund, Inc. ("LDF"), the Lawyers' Committee for Civil Rights Under Law ("LCCRUL"), the Puerto Rican Legal Defense and Education Fund, Inc. ("PRLDEF"), the Mexican-American Legal Defense and Educational Fund ("MALDEF"), and the American Civil Liberties Union ("ACLU"), *amici curiae.*

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[1] The parties have consented to the filing of this brief, and their letters of consent have been lodged with the Clerk of this Court under Rule 36.2 of the Rules of this Court.

Amici are non-profit, civil rights organizations which provide legal representation to persons seeking to vindicate civil and constitutional rights. *Amici* litigate throughout the federal courts and frequently appear as counsel before this Court representing Blacks, Hispanics and other minorities in cases arising under our federal civil rights laws and under our Constitution. *Amici* provide this representation through their own staff attorneys and through cooperating private counsel, whose substantial litigation costs and expenses are often paid by *amici*. Both the quantity and the quality of the legal representation which can be provided by *amici* are directly affected by the amount of attorneys' fees awarded in cases in which the parties whom they represent have prevailed.

Amici were involved in most of the civil rights cases approvingly cited in the House and Senate Reports accompanying the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, as amended, including cases under other fee-shifting statutes in which the courts held that fee awards to plaintiffs represented by civil rights organizations should not be based on different standards than awards to plaintiffs represented by privately retained counsel. *Amici* also have been involved in more than a dozen cases in which the courts of appeals have applied this principle.

As a result of the court decisions properly construing the Act and similar statutes to require that fee awards to prevailing parties be based upon market rates, *amici* have been able at least to maintain the level of legal services provided to individuals whose rights have been violated, despite sharply increased costs and the high rate of inflation. The cost-based approaches to fee computation advocated by the State would result in a severe curtailment of the legal representation provided by and through *amici*.

Because we believe that the novel approaches to fee computation urged by the State are contrary to Congress'

intent and purpose as set forth in the legislative history of the 1976 Act, we submit this Brief *Amici Curiae* in support of Respondent.

SUMMARY OF ARGUMENT

1. All indicia of the legislative purpose underlying the 1976 Civil Rights Attorney's Fees Awards Act compel the conclusion that Congress intended market-based fee computation, using market-value hourly rates and including upward and downward adjustments of the lodestar, to be applied to prevailing parties represented by non-profit and civil rights organizations. Both the Senate and House Reports, as well as the floor statements of the Act's supporters, show that non-profit and civil rights organizations are entitled to market fees and approve the results reached in earlier cases which barred any reduction of market-based fees for such organizations. These sources confirm that the "appropriate standards" were "correctly applied" in three illustrative cases which "did not produce windfalls"; in those cases, the courts rejected fee reduction for non-profit organizations, applied market-value hourly rates, and made upward adjustments of the lodestars. The House and Senate Reports also state that fees are to be awarded under the Act according to "the same standards" which prevail in other types of equally complex federal litigation, such as antitrust cases, standards which require the application of market-value hourly rates and allow adjustments of the lodestar. This construction of the statute has been followed overwhelmingly in the courts of appeals since the Act became effective and it has been ratified by subsequent Congresses.

2. Throughout its Brief, the State offers a variety of policy options for this Court to substitute in place of this settled and correct construction of the Act, despite the fact that it is not the role of the federal courts to act as super-legislatures, particularly on matters on which Congress has already spoken. The State, quite

simply, has altogether lost sight of the fact that "policy questions appropriately resolved in Congress . . . are *not* subject to reexamination in the federal courts under the guise of judicial review," *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978) (emphasis in original).

Any reduction of market-based fee compensation for non-profit and civil rights organizations under the Act not only would contravene congressional intent, but it would also violate the express purpose of the Act: the encouragement and promotion of private enforcement of our fundamental civil and constitutional rights. The State's cost-based policy options would subvert accomplishment of that purpose by forcing civil rights organizations into major litigation over fees, involving far-reaching inquiries of massive proportions. Continued use of market-based fee computation of awards to non-profit organizations, on the other hand, would fulfill Congress' express purpose by facilitating representation of plaintiffs with civil rights and constitutional claims, as Congress intended.

ARGUMENT

In the trial court, New York asserted none of the cost-based fee contentions which it subsequently raised in its Petition for Certiorari and which it has vigorously pursued in its Brief.[2] The State both failed to submit any

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[2] Although the Brief for Petitioner challenges the traditional standards of market-based fee compensation not just for non-profit and civil rights organizations, but also for private firms, the latter issue is not presented on the facts of this case and is not encompassed within the questions presented to this Court in the State's Petition for Certiorari, at i. Accordingly, *amici* here address only the standards for fee awards to non-profit and civil rights organizations.

Further, while the State advances two basic contentions (that the use of market rates to determine the "lodestar" figure for an award, *see Hensley v. Eckerhart*, 76 L. Ed. 2d 40, 50-51 (1983), is inappropriate where the prevailing plaintiff is represented by counsel employed by a non-profit organization; and that in such circumstances a modification to the lodestar figure for contingency

affidavits or documentary evidence in opposition to Respondent's application and also affirmatively waived its right to present any evidence at the fee hearing. It thus acceded, in the trial court, to the district judge's application of well-established judicial standards for the determination of "reasonable" fee awards under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 as amended [the "Act" or "1976 Act"] and other federal fee-shifting statutes. This Court should, therefore, affirm the judgment below since on the record before it the district court cannot be said to have abused its discretion. *Trustees v. Greenough*, 105 U.S. 527, 537 (1881).

If the Court decides, notwithstanding these facts, to consider the merits of the State's policy proposals, they must be rejected because they are wholly inconsistent with the congressional intent and purpose underlying the Act, as set forth primarily in S. Rep. No. 1011, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News 5908-14; and in H.R. Rep. No. 1558, 94th Cong., 2d Sess. (1976), *reprinted in* E. Larson, *Federal Court Awards of Attorney's Fees* 288-312 (1981) [hereinafter referred to, respectively, as the "Senate Report" and the "House Report"].

I. Congress Intended Trial Courts to Award Market-Based Fees Under the 1976 Act to Prevailing Plaintiffs Represented by Non-Profit Civil Rights Organizations

Nothing in the language of the 1976 Act provides for the application of different standards in awarding fees to lawyers employed by non-profit organizations rather than private law firms. Nothing in the legislative history of the Act supports an argument that different rules

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risks or quality is also inappropriate), this Brief addresses principally the first contention. *Amici* view contingency and quality adjustments as part of market-based fee calculation. The subject is dealt with more fully in the Brief of the Alliance for Justice, et al., *Amici Curiae*.

should apply. To the contrary, not only does the legislative history of the Act establish Congress' intent that market-based fees should be awarded to non-profit civil rights organizations, but subsequent Congresses have ratified that intent.

A. *The Legislative History of the 1976 Act Thoroughly Demonstrates Congress' Intent to Authorize Market-Based Fee Awards*

Both the committee reports and the floor debates on the 1976 Act make abundantly clear Congress' intention that non-profit organizations are entitled to market-based fee awards under the statute, just as are private law firms, in order to carry out its legislative purpose to facilitate private-party judicial enforcement of civil and constitutional rights.[3]

1. The House Report, at 8 n.16, explicitly approves awards to non-profit organizations in a footnote to the portion of the report dealing with the standards for determining "Reasonable fees" under the Act, in which market-based fee computation is endorsed:[4]

> Similarly, a prevailing party is entitled to counsel fees even if represented by an organization or if the party is itself an organization. *Incarcerated Men of Allen County* v. *Fair*, [507 F.2d 281 (6th Cir. 1974)]; *Torres* v. *Sachs*, 69 F.R.D. 343 (S.D.N.Y. 1975), aff'd. [538 F.2d 10] (2d Cir. . . . 1976); *Fairley* v. *Patterson*, 493 F.2d 598 (5th Cir. 1974).[5]

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[3] *See infra* pp. 24-28.

[4] *See infra* pp. 13-14.

[5] The Senate Report, similarly, explains the circumstances in which fees would be awarded by referring to cases litigated under other fee-shifting statutes in which awards were made to prevailing parties represented by civil rights organizations. *See, e.g.*, Senate Report at 5, citing *Bradley v. School Bd. of Richmond*, 416 U.S. 696 (1974), an LDF case; *Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421 (8th Cir. 1976), an LDF case; and *ASPIRA of New York, Inc. v. Board of Educ. of New York*, 65 F.R.D. 541 (S.D.N.Y. 1975), a PRLDEF case.

Examination of the cited cases makes clear that the organizations referred to were non-profit groups providing legal services in civil rights cases.[6]

Of equal or greater significance is the fact that two of the illustrative decisions—*Torres v. Sachs* and *Fairley v. Patterson*—did not concern entitlement to an award but instead involved only the *amount* of fees awardable. In both cases the courts rejected arguments that awards to civil rights organizations should be less than the market-based fees paid to private attorneys.

In *Fairley v. Patterson*, 493 F.2d 598 (5th Cir. 1974), a LCCRUL lawsuit, the issue was "whether the [trial] court abused its discretion in limiting the awarded amount," *id.* at 606. The court held explicitly "that allowable fees and expenses may not be reduced because [plaintiffs'] attorney was employed or funded by a civil rights organization and/or tax exempt foundation." *Id.* And in *Torres v. Sachs*, 69 F.R.D. 343 (S.D.N.Y. 1975), *aff'd*, 538 F.2d 10 (2d Cir. 1976), a PRLDEF case, defendants argued in both the trial court and on appeal that because plaintiffs' counsel were employed by "legal services organizations," "some measure of fees should be used less than the going rates for similar services received by privately employed counsel," 538 F.2d at 11. The district court specifically applied market-based hourly rates for the organizational attorneys, 69 F.R.D. at 347-

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[6] It is also evident from the floor debates that the Members of Congress were well aware that fee awards would be made to non-profit organizations. For example, Senator Helms, an opponent, complained:

> Undoubtedly the added incentive of receiving one's attorneys' fees from the opposing party will increase the number of cases brought before the Federal bench. The legal journal, Juris Doctor, reports future "attorneys' fee awards were the number one factor in the future of public interest law financing."

122 Cong. Rec. 38134 (1976).

48,[7] and the Second Circuit affirmed, squarely rejecting the defendants' arguments and quoting from *Fairley*, 538 F.2d at 12-14.

This legislative history, approvingly incorporating *Torres* and *Fairley*, was expressly recognized in *New York Gaslight Club v. Carey*, 447 U.S. 54, 70 n.9 (1980), where this Court relied specifically on *Torres* and also on *Reynolds v. Coomey*, 567 F.2d 1166, 1167 (1st Cir. 1978) (an LDF case in which the court required fees "to be awarded to attorneys employed by a public interest firm or organization on the same basis as to a private practitioner") and correctly observed that "Congress endorsed such decisions" when it enacted the 1976 Act.

2. The Senate Report states that the appropriate standards for determining reasonable fee awards under the Act were correctly applied in three illustrative cases, and that in each instance the award did not produce a "windfall:"

> The appropriate standards, see *Johnson* v. *Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974), are correctly applied in such cases as *Stanford Daily* v. *Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974); *Davis* v. *County of Los Angeles*, 8 E.P.D. ¶ 9444 (C.D. Cal. 1974); and *Swann* v. *Charlotte-Mecklenburg Board of Education*, 66 F.R.D. 483 (W.D.N.C. 1975). These cases have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys.

Senate Report at 6, quoted with approval in *Hensley v. Eckerhart*, 76 L. Ed. 2d at 48 n.4. Of obvious importance

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[7] For a case which was litigated on the merits in 1973 and 1974, the trial court set the market-based hourly rates for plaintiffs' three organizational lawyers as follows: $75 per hour for lead counsel, a 1968 law graduate; and $50 per hour for plaintiffs' other two lawyers, law graduates in 1969 and 1970, respectively. 69 F.R.D. at 346-48. The fee was ordered "to be paid by defendants to the Puerto Rican Legal Defense Fund." *Id.* at 348.

to the Senate Committee—and to the Congress which adopted its recommendations—were (a) the appropriate standards set forth in *Johnson*; (b) the correct application of those standards in *Stanford Daily*, *Davis*, and *Swann*; and (c) the conclusion that the fee awards in the three illustrative cases did not produce windfalls.

a. In *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974), a decision involving appropriate fee computation for LDF staff attorneys and cooperating attorneys, the Fifth Circuit rejected a trial court's low fee award—with hourly rates averaging between $28 and $33, rates below the bar association's minimum fee scale, *id.* at 717—and directed trial courts to consider twelve factors commonly used to determine lawyers' fees, *id.* at 717-19.[8] Rather than anywhere suggesting that different factors should govern fees for the LDF on the one hand and for private firms on the other, the Fifth Circuit remanded for reconsideration of the fee awards to all of plaintiffs' counsel in light of the same, uniform set of factors which, the Fifth Circuit observed, were "consistent with those recommended by the American Bar Association's Code of Professional Responsibility, Ethical Consideration 2-18, Disciplinary Rule 2-106," *id.* at 719. *Accord*, *Hensley v. Eckerhart*, 76 L. Ed. 2d at 48 n.3 ("These factors derive directly from the American Bar Association Code of Professional Responsibility, Disciplinary Rule 2-106").

b. The factors set forth in *Johnson* were meaningfully illustrated in the "three district court decisions that 'correctly applied' the twelve factors." *Hensley*, 76 L. Ed. 2d at 48.

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[8] The twelve factors set forth and described in *Johnson* were summarized by this Court in *Hensley v. Eckerhart*, 76 L. Ed. 2d at 48 n.3. The Court in *Hensley*, *id.* at 48, also noted that *Johnson* was relied upon not only in the Senate Report (at 6) but also in the House Report (at 8). *See also* 122 Cong. Rec. 32185 (1976) (Sen. Tunney); *id.* at 35115 (Rep. Anderson); *id.* at 35123 (Rep. Drinan).

The district court's fee decision in *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974), is the very model of the lodestar method of fee computation now required of the trial courts by all courts of appeals. *See generally* the decisions collected in Appendix A to this Brief. The *Stanford Daily* court first determined the time reasonably expended by plaintiff's counsel, *id.* at 683, 687, then ascertained the hourly rates which reflected the non-contingent value [9] of the attorneys' services, *id.* at 685, and then made an upward adjustment to account for contingency risks and quality of representation, *id.* at 688.[10]

The same lodestar methodology was used to arrive at a reasonable fee award for both a private practitioner and for a civil rights organization in *Davis v. County of Los Angeles*, 8 E.P.D. ¶ 9444 (C.D. Cal. 1974).[11] Entirely irrelevant in calculating the fee award was the fact that plaintiffs were represented by a non-profit organization:

> In determining the amount of the fees to be awarded, it is not legally relevant that plaintiffs' counsel . . . are employed by the Center for Law In The Public Interest, a privately funded non-profit

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[9] *See* 122 Cong. Rec. 35123 (1976) (Rep. Drinan):

> I should add that the phrase "attorney's fee" would include the values of the legal services provided by counsel, including all incidental and necessary expenses incurred in furnishing effective and competent representation.

[10] The *Stanford Daily* court concluded that the requested 750 hours were reasonable; allowed a $50 hourly rate which, the court pointed out, "is only $1.70 an hour less than the average hourly rate which plaintiffs' attorneys recommended to the court"; and then adjusted the $37,500 lodestar (750 hours times $50 per hour) upward by $10,000, an adjustment of the lodestar by approximately 28%. 64 F.R.D. at 683-88.

[11] The *Davis* court fixed market rates of $60, $55, and $35 per hour for plaintiffs' three lawyers, and upon consideration of the adjustment factors, allowed an upward adjustment of the lodestar by approximately 18%. 8 E.P.D. at 5048.

> public interest law firm. It is in the interest of the public that such law firms be awarded reasonable attorneys' fees to be computed in the traditional manner when its counsel perform legal services otherwise entitling them to the award of attorneys' fees.

8 E.P.D. at 5048-49 (citations omitted).

The identical conclusion was reached by the court in *Swann v. Charlotte-Mecklenburg Board of Education*, 66 F.R.D. 483 (W.D.N.C. 1975), a decision, like *Johnson*, awarding fees for time expended by LDF staff attorneys and local cooperating attorneys.[12] The LDF, in addition to being a recipient of the fees in *Swann*, had reimbursed local counsel for "their out-of-pocket expenses" and had "also compensated local counsel on a nominal basis." 66 F.R.D. at 486. These factors, however, were deemed irrelevant in view of the established legal principle that market-based "reasonable fees should be granted . . . regardless of whether the attorneys were salaried employees of a legal aid agency." *Id.* (citations omitted).

c. As observed in the Senate Report at 6, the fee awards in the foregoing cases—computed according to traditional market-based standards—did not result in "windfalls." Instead, "These cases have resulted in fees which are *adequate* to attract competent counsel, *but*

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[12] Although the actual fee computation methodology is not explicitly set forth in *Swann*, the trial court did agree with the reasonableness of the 2,700 hours expended, and the court allowed a fee award of $175,000, 66 F.R.D. at 484, 486. From these figures it may be inferred that the trial court applied hourly rates averaging $65 per hour, or that lower market rates were applied to determine a lodestar which was then adjusted upwards. While the *Swann* court did not award plaintiffs' counsel all that they requested and fixed a total fee award which was less than the amount paid by the school board to its retained private counsel, the court certainly did not use different standards for those of plaintiffs' counsel employed by LDF and those in private practice in North Carolina.

which do not produce windfalls to attorneys." *Id.* (emphasis added).[13]

d. Congressional adoption of the *Johnson* factors, and congressional approval of their correct application in the foregoing three illustrative cases, was recognized by this Court in *Hensley v. Eckerhart*, 76 L. Ed. 2d at 48 & n.4, a case involving the appropriate standards for awarding fees to Legal Services of Eastern Missouri. In *Hensley*, there was no disagreement between the Justices in the majority and the concurring Justices with regard to the appropriate elements of the fee computation. Justice Powell wrote, for the majority:

> The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the *value* of a lawyer's services. . . . The product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the "results obtained."

76 L. Ed. 2d at 50, 51 (footnote omitted and emphasis added).[14] The four concurring Justices agreed:

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[13] No Senator or Representative suggested that windfall awards were likely under the Act. The only mention of "windfalls" during the debates referred to percentage-of-recovery awards in the tens of millions of dollars in treble damage suits. *See* 122 Cong. Rec. 31473-74 (1976) (Sen. Allen).

[14] The fee computation methodology explained by Justice Powell for the majority in *Hensley* as applicable to determining fees for civil rights organizations is the same methodology set forth as applicable to Title VII private practitioners in *Delta Air Lines v. August*, 450 U.S. 346, 364-65 (1981) (Powell, J., concurring):

> The primary factors relevant to setting the fee usually are the time expended and a reasonable hourly rate for that time.[3]

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[3] In *Lindy Bros. Builders, Inc.* v. *American Radiator & Standard Sanitary Corp.*, 540 F.2d 102 (1976) (en banc), the

> As nearly as possible, market standards should prevail, for that is the best way of ensuring that competent counsel will be available to all persons with bona fide civil rights claims. This means that judges awarding fees must make certain that attorneys are paid the full *value* that their efforts would receive on the open market in non-civil-rights cases, both by awarding them market-rate fees, and by awarding fees only for time *reasonably* expended. . . .

76 L. Ed. 2d at 59 (citations omitted and emphasis added in part). *See also id.* at 58 n.6 (concurring opinion).

3. The same conclusion flows from the 94th Congress' adoption of *existing judicial standards* under other federal fee-shifting statutes to apply under the 1976 Act. As this Court correctly pointed out in *Hanrahan v. Hampton*, 446 U.S. 754 (1980), "The provision for counsel fees in § 1988 was patterned upon the attorney's fees provisions contained in Titles II and VII of the Civil Rights Act of 1964, and § 402 of the Voting Rights Act Amendments of 1975." 446 U.S. at 758 n.4 (statutory citations omitted), citing the Senate Report at 2 and the House Report at 5, and further citing interpretive cases. In addition to the legislative history references cited in *Hanrahan*, the House Report, at 8, explicitly states the "inten[t] that, at a minimum, existing judicial standards,

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Court of Appeals for the Third Circuit held that the primary determinant of a court-awarded fee—the "lodestar"—should be the amount of time reasonably expended on the matter multiplied by a reasonable hourly rate. The "lodestar" is subject to adjustment based on, *inter alia*, the quality of the work and the results obtained. *Id.*, at 117-118; accord, *Furtado* v. *Bishop*, 635 F.2d 915 (CA1 1980); *Copeland* v. *Marshall*, 205 U.S. App. D.C. 390, 641 F.2d 880 (1980) (en banc). Cf. *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (CA5 1974).

to which ample reference is made in this report, should guide the courts in construing [the Act]." [15]

Under existing judicial standards interpreting other federal fee-shifting statutes, the uniform judicial approach was to apply the same market-based standards to plaintiffs represented by either public or private counsel. See, for example, the legislative history-cited cases: *Torres*, 538 F.2d at 12-14 (Voting Rights Act); *Fairley*, 493 F.2d at 606 (same); *Swann*, 66 F.R.D. at 486 (ESAA); *Davis*, 8 E.P.D. at 5048-49 (Title VII); *see also Tillman v. Wheaton-Haven Recreation Ass'n*, 517 F.2d 1141, 1148 (4th Cir. 1975) (Title II).

4. Congress' approval of fee awards based on market rates and appropriate adjustments of the lodestar as "reasonable" awards is further illustrated by its reliance on the standards of fee computation applied in other types of equally complex federal litigation. In addition to expressly approving the standards applied under other federal fee-shifting statutes, the Senate Report, at 6, states:

> It is intended that the amount of fees awarded under [the Act] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases and not be reduced because the rights involved may be non-pecuniary in nature.[16]

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[15] *See also* Senate Report, at 4. Proponents of the 1976 Act also repeatedly referred during the floor debates to the ample precedent under earlier statutes which would guide the courts in applying the bill's provisions. *See, e.g.*, 122 Cong. Rec. 31471 (1976) (Sen. Scott); *id.* at 35114-15 (Rep. Anderson); *id.* at 35117 (Rep. Railsback); *id.* at 35122-23 (Rep. Drinan); *id.* at 35125 (Rep. Kastenmeier). Senator Helms sought to impose a "bad faith" requirement in order to prevent construction of the Act in the same manner as earlier fee-shifting provisions. His amendment was defeated. 122 Cong. Rec. 38133-35 (1976).

[16] A similar comparative reference to fee compensation in antitrust cases is made in the House Report at 9: "The same principle should apply here as civil rights plaintiffs should not be singled out for different and less favorable treatment."

In other types of complex federal litigation, such as antitrust and securities cases, the amount of fees awarded has never been governed by—and is not now governed by—any factors pertaining to the overhead or to the cost outlays of the lawyers' employers, or to the take-home pay of the lawyers themselves. Instead, fee awards in large monetary cases were sometimes based on percentages of the recoveries, while fee awards in other litigation (and often in monetary cases as well) were governed simply by market-based standards.

By 1976, the amount of fees awarded in antitrust and securities cases was determined by the lodestar method. *See generally Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 166-70 (3d Cir. 1973), and *Detroit v. Grinnell Corp.*, 495 F.2d 448, 470-74 (2d Cir. 1974).[17] The lodestar method employs what unquestionably are market-based standards of fee computation: consideration of hours reasonably expended, the hourly rates which reflect the value of the lawyers' services, and adjustments to the lodestar to account for contingency and quality factors which alter rates in the market place.[18]

This of course is the same lodestar method which was utilized by the courts in *Stanford Daily* and *Davis* (where the courts "correctly applied" the appropriate criteria of fee compensation). And it is the same lodestar method required of the trial courts by all courts of appeals in civil rights cases and in other complex cases alike. *See generally* the cases collected in Appendix A to this Brief.

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[17] *See also, e.g., Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 125-29 (8th Cir. 1975); *Ramey v. Cincinnati Enquirer*, 508 F.2d 1188, 1196-98 (6th Cir. 1974), *cert. denied*, 422 U.S. 1048 (1975); *Farmington Dowel Products Co. v. Forster Mfg. Co.*, 421 F.2d 61, 86-91 (1st Cir. 1970); *cf. Pacific Coast Agricultural Export Ass'n v. Sunkist Growers*, 526 F.2d 1196, 1210 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976).

[18] *See generally* E. Larson, *Federal Court Awards of Attorney's Fees* 115-240 (1981), and cases cited herein.

B. *Subsequent Congresses Have Ratified the Interpretation of the 1976 Act Which Was Applied by the District Court in this Case*

In *Bob Jones University v. United States*, 76 L. Ed. 2d 157, 178-79 (1983), and in other cases, this Court has recognized that when a statute has been given a consistent judicial construction, and when that interpretation has been made known to Congress but Congress takes no action to amend the law in order to overturn that construction, this congressional "ratification" makes the prevailing judicial interpretation a part of the law. That is the situation here.

As the Seventh Circuit recently put it, "The notion that fee awards should be reduced where they are to be paid to not-for-profit organizations has been rejected by every court of appeals to consider it." *Gautreaux v. Chicago Housing Authority*, 690 F.2d 601, 613 (7th Cir. 1982). This virtual unanimity is reflected in the twenty courts of appeals' decisions which have addressed this issue and resolved it (primarily in reliance upon the legislative history and the purposes of the Act). *See generally* the courts of appeals' decisions collected in Appendix B to this Brief.[19] Under these decisions, and in conjunction

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[19] We concede that the State's elaborate argument does find support in one currently viable decision: Judge Newman's recent opinion for the Second Circuit in *New York Ass'n for Retarded Children v. Carey*, 711 F.2d 1136, 1148-52 (2d Cir. 1983). Judge Newman's opinion, however, is likely to remain a lonely aberration. It is contrary to a Tenth Circuit ruling issued the same day, *Ramos v. Lamm*, 713 F.2d 546, 551-52 (10th Cir. 1983), and to the decisions of every other court of appeals. *See* Appendix B to this Brief. Significantly, it is also contrary to both the majority and concurring opinions in *Hensley*.

The other cases upon which the State relies hardly presage a trend. *Page v. Preisser*, 468 F. Supp. 399 (S.D. Iowa 1979) and *Aleager v. District Court of Polk County*, 447 F. Supp. 572 (S.D. Iowa 1977) were disapproved by the Eighth Circuit, *see Oldham v. Ehrlich*, 617 F.2d 163, 168-69 (8th Cir. 1980), and thereafter the

with the lodestar methodology, the hourly rate component of the lodestar is determined by the market-based value of the attorneys' services, permissible adjustments to the lodestar account for contingency and quality factors, and the end result is a reasonable fee and not a windfall.[20]

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author of those rulings himself allowed market rate fees, without reduction, to plaintiffs represented by the Legal Services Corporation of Iowa in a decision quickly affirmed by the Eighth Circuit on the basis of *Oldham, Collins v. Hoke*, 705 F.2d 959 (8th Cir. 1983). *Glover v. Johnson*, 531 F. Supp. 1036 (E.D. Mich. 1982) inexplicably departed from the fee computation method adopted by the Sixth Circuit in *Northcross v. Board of Educ. of Memphis*, 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980) and has not been followed by other courts within the Circuit. Finally, Judge Wilkey's opinion in *Copeland v. Marshall*, 594 F.2d 244 (D.C. Cir. 1978) and his dissent in *id.*, 641 F.2d 880, 908-30 (D.C. Cir. 1980) (*en banc*) are nothing more than a minority viewpoint rejected within his own Circuit and by others, *see, e.g., Palmigiano v. Garrahy*, 616 F.2d 598, 603 (1st Cir.), *cert. denied*, 449 U.S. 839 (1980).

[20] Petitioner's repeated mischaracterization of contingency-factor adjustments to the lodestar as "windfalls" unauthorized by the Act not only is a contention directly contrary to the legislative history of the Act, *see supra* at pp. 6-15, but it also represents a serious misunderstanding about why risks of litigation and delays in payment must be considered in computing a reasonable fee. As summarized by the Fifth Circuit *en banc* in *Jones v. Diamond*, 636 F.2d 1364, 1382 (5th Cir. 1981), *cert. dismissed*, 102 S. Ct. 27 (1982), consideration of the contingency factors in setting a reasonable fee under § 1988 "reflects the provisions of the ABA Code of Professional Responsibility, DR 2-106(B)(8), and the practice of the Bar." The reason is obvious:

> Lawyers who are to be compensated only in the event of victory expect and are entitled to be paid more when successful than those who are assured of compensation regardless of result. This is neither less nor more appropriate in civil rights litigation than in personal injury cases. The standard of compensation must enable counsel to accept apparently just causes without awaiting sure winners.

Id. The Sixth Circuit reiterated the same conclusion somewhat more bluntly in a case involving reasonable compensation for the Legal Defense Fund: "The contingency factor is not a 'bonus'

As the Brief of the Alliance for Justice, *et al.*, *Amici Curiae*, demonstrates in detail, Congress since 1976 has on numerous occasions been petitioned by State Attorneys General and others to amend the 1976 Act to alter the standards for awarding and calculating fees. These proposals, however, have never been given serious consideration. Congress has thus demonstrated, in the most signicant manner possible, its satisfaction with the overwhelmingly consistent interpretation of the statute and the State's arguments are more appropriately addressed to Congress than to this Court.

II. The Standards for Fee Awards Proposed by the State Would Be Wholly Impracticable of Application and Are Contrary to the Congressional Purpose in Enacting the 1976 Act

Opposing the traditional lodestar method of calculating fee awards which was intended by Congress, the State asks this Court to amend the 1976 Act by mandating the use of a complicated cost-based approach. Not only are the State's suggested approaches unworkable and arbitrary, but they would engulf the federal courts in a morass of discovery and factual disputes solely over fees.[21] Analysis of a law firm's and a non-profit organi-

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but is part of the reasonable compensation to which a prevailing party's attorney is entitled under § 1988." *Northcross v. Board of Educ. of Memphis*, 611 F.2d 624, 638 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980). *See also Minority Employees at NASA v. Fraech*, 694 F.2d 846, 847 (D.C. Cir. 1982) (upholding a 10% lodestar adjustment for the Lawyers' Committee, which "receives remuneration only in the event of success" and which therefore was eligible for a contingency adjustment "to the same extent as similarly situated private attorneys").

[21] One of the virtues of the 1976 legislation is its simplicity:

> . . . will also result in a significant saving of judicial resources. At present, due to the Alyeska decision, a court must analyze a party's actions to determine bad faith in order to award attorneys' fees. This is a complex, time-consuming process often requiring an extensive evidentiary hearing. The enactment of

zation's costs and overhead in order to determine an appropriate fee is, as we show below, an extraordinarily more complex and time-consuming process even than the search for "bad faith," *see* n.21 *supra*. Imposition of such a process by this Court would only impede and deter any firm or organization from seeking adequate compensation for successful representation of a prevailing party in an action covered by the 1976 Act.

A. *A Cost-Based Approach to Fee Computation Would Involve Civil Rights Organizations in Lengthy and Necessarily Complex Proceedings to Determine Fees*

The State's bold policy proposals for a cost-based approach to fee computation would be devastating to civil rights enforcement. A cost-based approach not only would relegate civil rights litigation to a back-of-the-bus, second-class status but also would involve the federal courts, as well as organizations, in lengthy and necessarily complex proceedings to determine fee awards.

1. The three cost-based policy options which the State urges this Court to choose among not only are fraught with practical difficulties, but in fact are balanced on top of two false premises. First, the supposed willingness of private firms to lay open their financial records so as to enable analysis of their hourly rate structures and overhead for comparative purposes, thereby permitting the State's legislative policy options to be implemented, is simply nonexistent. Second, the alleged ease of utilizing a cost-based approach is refuted by the error of the aforementioned assumption, by the absence of any generally accepted method for law firm cost accounting, and

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this legislation will make such an evidentiary hearing unnecessary in the many civil rights cases presently pending in the Federal courts.

122 Cong. Rec. 33314-15 (1976) (Sen. Abourezk, floor manager of the bill). *See also Hensley v. Eckerhart*, 76 L. Ed. 2d at 53 ("A request for attorney's fees should not result in a second major litigation").

also by the prolonged and difficult litigation which must inevitably occur over cost accounting for fee purposes. Given the fact that "the fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate . . . hourly rates," *Hensley v. Eckerhart*, 76 L. Ed. 2d at 53, the actual burdens imposed on *prevailing plaintiffs' counsel* by the State's policy options would be overwhelming.

a. The State, in its Brief at 12-13, 23-26, asserts that the best policy option is the approach suggested by Judge Friendly in his concurring opinion in *New York State Association for Retarded Children v. Carey*, 711 F.2d 1136, 1155 (2d Cir. 1983), under which courts would determine hourly rates based, first, upon "the hourly compensation paid to private attorneys in the same community with equivalent experience," and second, upon "the nonprofit office's per hour overhead." This approach would require, in every case, two sets of inquiries of monumental proportions. First, counsel seeking *or* opposing an award would be expected to discover, from all (most? more than half?) private firms in the community, all records pertaining to their financial structures and to their billing practices, for the purpose of supporting their claims as to the hourly compensation paid private attorneys in the community. Second, counsel for prevailing plaintiffs would have to restructure the financial records of the non-profit organizations which employ them in order to allocate all one-time as well as all on-going overhead costs to particular pieces of litigation;[22] and

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[22] The allocation of "overhead costs" to particular pieces of litigation or to a particular attorney would be not only extraordinarily time-consuming but also ultimately arbitrary, if not nearly impossible, in view of the fact that there exists no generally accepted accounting principle to apply to this suggested task. For example, there is no generally accepted accounting principle to use in determining cost allocations to different organizational activities or units, to major and particularly complex pieces of litigation as opposed to relatively more routine cases, to cases litigated by experienced attorneys rather than by younger attorneys, to cases

then, of course, open those records to discovery.[23] Even assuming that the first set of inquiries would produce anything at all, and that the second would produce anything other than extended litigation about the allocation of overhead, there in any event is no question that the inquiries and resultant litigation battles would assume massive proportions.

b. The State alternatively proposes, in its Brief at 23, 29, the "simpler, albeit less exact formulation . . . advocated by Judge Newman" in his opinion in *Association for Retarded Children*, 711 F.2d at 1151-52, under which district court judges would select an entirely arbitrary "break point" ceiling on hourly rates[24] but which would

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litigated out of town rather than in town. These problems are magnified for organizations such as *amici*, who are involved in scores of different cases at any given moment.

Additionally, there would be further complexities about how to allocate the costs of technological equipment such as word processors and computer terminals, which are subject to major up-front outlays followed thereafter by lesser outlays, and whose effective lives are uncertain at best.

Amici recognize that non-profit organizations are subject to annual financial reporting to the Internal Revenue Service. But the defined accounting procedures used for this overall purpose have no applicability to the per-case or per-attorney cost allocations proposed by the State here.

[23] *See, e.g., Shelton v. Tucker*, 364 U.S. 479 (1960); *Bates v. Little Rock*, 361 U.S. 516 (1960); *NAACP v. Alabama*, 357 U.S. 449 (1958).

[24] Judge Newman's opinion does not explain the derivation of the two "break point" figures to be applied by the trial court on remand in that case: a $75 per hour ceiling for services rendered in the years 1978-80, and a $50 per hour ceiling for services rendered in the years 1972-77. 711 F.2d at 1152-53. The latter figure is apparently based upon the perceived appropriateness of the $75 per hour ceiling, which Judge Wyzanski, concurring, 711 F.2d at 1156, suggested may have been "borrowed" from the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(A). The EAJA is totally inapplicable to this litigation. The House Report on that statute is explicit:

> Moreover, this section is not intended to replace or supersede any existing fee-shifting statutes such as the Freedom of In-

also permit higher hourly rates where necessary to recover counsel's actual costs. Despite the superficial simplicity of Judge Newman's formulation, his invitation for judicially sanctioned arbitrariness in fact invites precisely the same two sets of massive inquiries suggested by Judge Friendly. Counsel for prevailing plaintiffs, in order to protect against arbitrarily low or excessively parsimonious "break point" determinations, would necessarily attempt to meet their burden of proof by trying to lay open the financial records of private law firms and by restructuring the financial records of their organizations to allocate costs to individual cases, also subject to discovery. Again, the resultant inquiries and litigation disputes would assume massive proportions.

c. Possibly in recognition of the multifarious problems which would flow from its first two policy options, the State proposes that yet another cost-based approach "would be for the district courts to set hourly rates based on promulgated schedules of estimated hourly salaries of private attorneys, based on years of experience, *and* average hourly overhead costs." Brief for Petitioner, at 29 (emphasis in original). Although the State apparently believes that this policy option would "avoid . . . the necessity of a case-by-case calculation," *id.*, this policy option both ignores the adjudicatory—not legislative—role of the judiciary and also seemingly attempts to circumvent the antitrust ban on promulgated fee schedules, *see Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). This policy option would encourage, if not compel, the very same monumental inquiries into the financial struc-

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formation Act, the Civil Rights Acts, and the Voting Rights Act in which Congress has indicated a specific intent to encourage vigorous enforcement, or to alter the standards or the case law governing those Acts. It is intended to apply only to cases (other than tort cases) where fee awards against the government are not already authorized.

H.R. Rep. No. 1418, 96th Cong., 2d Sess. 18 (1980), *reprinted in* 1980 U.S. Code Cong. & Ad. News 4984, 4997. *Cf.* EAJA, Pub. L. 96-481, § 206, 94 Stat. 2325, 2330 (1980).

tures of private law firms, both by district courts intending to promulgate a fee schedule and thereafter by counsel when the schedule is sought to be applied to their cases.

2. "A request for attorney's fees should not result in a second major litigation." *Hensley v. Eckerhart*, 76 L. Ed. 2d at 53. Contrary to this admonition, and contrary to the recognition by all members of this Court in *Hensley* that market-based fees are to be awarded to plaintiffs represented by civil rights organizations, *see supra* pp. 12-13, the State here nevertheless proposes not only a second major litigation but truly major litigation, involving a series of far-reaching inquiries which would "'assume massive proportions, perhaps even dwarfing the case in chief.'" *Copeland v. Marshall*, 641 F.2d 880, 896 (D.C. Cir. 1980) (*en banc*), quoting from *Lindy Brothers Builders v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 116 (3d Cir. 1976) (*en banc*).

The massiveness of the inquiries attendant to a cost-based approach to fee computation was part of the reason for the *en banc* court's rejection of that policy option in *Copeland*. As the *en banc* court pointed out, the "problems associated with administering a 'cost-plus' calculus are multifarious," the nature of the questions which would have to be answered "creates the specter of a monumental inquiry on an issue wholly ancillary to the substance of the lawsuit," and the unavoidable result is that a "'cost-plus' method of calculating fees would indeed become the inquiry of 'massive proportions' that we strive to avoid." 641 F.2d at 896. None of these problems arises in the application of market value fees since "[t]he 'lodestar,' or 'market value,' method of fee setting has the virtue of being relatively easy to administer." *Id.*

The *en banc* court's rejection of a cost-based approach in *Copeland* however depended not "on administrative convenience alone" but instead on the fact that "the theoretical basis of 'cost-plus' is fundamentally incon-

sistent with Congress' purpose in providing for statutory fee-shifting." *Id.* at 897. In fact, the legislative history of the 1976 Act leaves no doubt that lawyers employed by civil rights organizations "should be compensated by using a market value approach." *Id.* at 899. There similarly is no doubt that market value fee compensation for non-profit and civil rights organizations fulfills Congress' purpose since full fee awards "help finance their work," and thereby "provide greater enforcement." *Id.*

B. *The Continued Application of Market-Based Fees to Civil Rights Organizations Satisfies Congress' Express Purpose of Promoting Enforcement of Civil and Constitutional Rights*

Congress' unquestioned purpose in enacting the 1976 Act was to promote enforcement of civil and constitutional rights. Fulfillment of that purpose compels market-based fee awards to civil rights organizations.

1. Repeated throughout the House and Senate Reports is an overriding theme: the necessity to enact the legislation to encourage private enforcement of civil and constitutional rights. The Senate Report, at 5, observes that after "several hearings held over a period of years," the Senate Committee "found that fee awards are essential if the Federal statutes to which [the Act] applies are to be fully enforced." This theme is repeated throughout the Report. *E.g.*, *id.* at 2:

> All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.

The House Committee fully concurred,[25] pointing out the obvious: that the purpose of the 1976 Act was to "attract

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[25] The House Report, at 1, states:

> The effective enforcement of Federal civil rights statutes depends largely on the efforts of private citizens. Although some agencies of the United States have civil rights responsibilities,

competent counsel in cases involving civil and constitutional rights," and that the hoped-for "effect of [the Act] will be to promote the enforcement of the Federal civil rights acts, as Congress intended." House Report, at 9.

2. Congress also recognized the important role played by civil rights and other non-profit organizations in enforcing civil and constitutional rights. Both the House and Senate Reports rely on cases involving *amici* and other organizations as examples of the kind of litigation to which the Act applies and the manner in which it is to be interpreted.

The most frequently cited decision in both Reports is *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), an LDF case in which this Court held that fees were to be awarded to prevailing plaintiffs unless special circumstances rendered an award of fees unjust. The Reports also discuss *Northcross v. Board of Education of Memphis*, 412 U.S. 427 (1973), and *Bradley v. School*

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their authority and resources are limited. In many instances where these laws are violated, it is necessary for the citizen to initiate court action to correct the illegality. Unless the judicial remedy is full and complete, it will remain a meaningless right. Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts. In authorizing an award of reasonable attorney's fees, [the Act] is designed to give such persons effective access to the judicial process where their grievances can be resolved according to law.

See also, e.g., 122 Cong. Rec. 31472 (1976) (Sen. Kennedy); *id.* at 31832 (Sen. Hathaway); *id.* at 33313-14 (Sen. Tunney); *id.* at 35118 (Rep. Seiberling); *id.* at 35126 (Rep. Kastenmeier); *id.* at 35127 (Rep. Jordan).

This Court's decision in *Alyeska Pipeline Serv. Corp. v. Wilderness Soc.*, 421 U.S. 240 (1975), denying fee awards in many civil rights cases, created a threat of significantly reduced private civil rights enforcement which the Congress wished to avoid. *See* House Report at 2-3. *See also* 122 Cong. Rec. 35118 (1976) (Rep. Bolling) (*Alyeska* decision created an "emergency" for Congress to deal with).

Board of Richmond, 416 U.S. 696 (1974), both also LDF suits.

Illustrating the breadth of civil rights enforcement litigation to which the Act was intended to apply, the House Report at 4-5 cites both to federal statutes and to illustrative cases brought through civil rights organizations to enforce those statutes. As to the enforcement of 42 U.S.C. § 1981, Congress cited *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975) (LDF), and *Tillman v. Wheaton-Haven Recreation Association*, 410 U.S. 431 (1973) (ACLU). Enforcement of 42 U.S.C. § 1983 was illustrated through reliance on *Brown v. Board of Education*, 347 U.S. 483 (1954) (LDF), and *O'Connor v. Donaldson*, 422 U.S. 563 (1975) (ACLU). Title VI enforcement was illustrated by reliance on several cases including *Hills v. Gautreaux*, 425 U.S. 284 (1975) (sponsored in part by the ACLU).

In view of Congress' reliance on these cases, coupled with its reliance on civil rights fee decisions rendered by the lower federal courts, it is simply inconceivable that Congress could have intended less than full market-value fee awards to civil rights organizations so as "to promote the enforcement of the Federal civil rights acts, as Congress intended." House Report, at 9. All indicia of congressional purpose compel the conclusion that plaintiffs represented by civil rights organizations are entitled to full market value fee compensation.

3. Effective private enforcement of civil and constitutional rights requires not only the opportunity to apply for fees when the litigation is successful, but also the opportunity to recover *adequate* fees. In rejecting fee-reduction arguments such as those now made by the State in this case, the courts of appeals have overwhelmingly held that awarding full market-value fees to civil rights organizations fulfills the congressional purpose of encouraging private civil rights enforcement in two important respects.

First, full fee compensation for civil rights organizations correlates perfectly with the congressional purpose, since such fees go not into attorneys' pockets but directly further civil rights litigation. As summarized by the Second Circuit in a Voting Rights Act case cited with approval in the House Report, *see supra* pp. 7-8, 14, since "[l]itigation to secure the law's protection has frequently depended on the exertions of organizations dedicated to the enforcement of the Civil Rights Act," and since the receipt of full fee awards by civil rights organizations "promotes their continued existence and service to the public in this field," therefore "full recompense for the value of services in successful litigation helps assure the continued availability of the services to those most in need of assistance in translating the promise of the Act into actually functioning voting rights." *Torres v. Sachs*, 538 F.2d 10, 13 (2d Cir. 1976).

Second, full fee compensation for civil rights organizations deters both unlawful behavior and also imprudent litigation tactics by defendants. As summarized by the District of Columbia Circuit *en banc* in a Title VII case, "to compute fees differently depending on the identity of the successful plaintiffs' attorney might result in two kinds of windfalls to defendants." [26]

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[26] *Copeland v. Marshall*, 641 F.2d at 899:

> The incentive to employers not to discriminate is reduced if diminished fee awards are assessed when discrimination is established. Moreover, where a public interest law firm serves as plaintiff's counsel . . . the defendant will be subject to a lesser incentive to settle a suit without litigation than would be the case if a high-priced private firm undertook plaintiff's representation . . . . Defendant's counsel could inundate the plaintiff with discovery requests without fear of paying the full value of the legal resources wasted in response. We do not think that Title VII intended that defendants should have an incentive to litigate imprudently simply because of the fortuity of the identity of plaintiff's counsel.

Relying on similar Voting Rights Act cases and Title VII cases, and to carry out Congress' express purpose in passing the 1976 Act, the courts of appeals have repeatedly reiterated the necessary fulfillment of *both these objectives* through market-value awards to civil rights organizations under the Act.[27] If Congress' express purpose is to be respected, market-value fee compensation must continue to be applied.

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[27] *See, e.g., Oldham v. Ehrlich*, 617 F.2d 163, 168-69 (8th Cir. 1980) ("Legal aid organizations can expand their services to indigent civil rights complaints by virtue of their receipt of attorneys' fees. And a defendant sued by a plaintiff retaining legal aid counsel should not be benefited by the fortuity that the plaintiff could not afford private counsel"); *Palmigiano v. Garrahy*, 616 F.2d 598, 602 (1st Cir.) (The ACLU's "National Prison Project, like other such organizations, has finite resources, and a full fee award will enable it to undertake further civil rights litigation . . . . Indeed, we are concerned that compensation at a lesser rate would result in a windfall to the defendants"), *cert. denied*, 449 U.S. 839 (1980); *Dennis v. Chang*, 611 F.2d 1302, 1306 (9th Cir. 1980) (Full compensation "serves the purposes of the Act for two reasons: (1) the award encourages the legal services organization to expend its limited resources in litigation aimed at enforcing the civil rights statutes; and (2) the award encourages potential defendants to comply with civil rights statutes"); *see generally* the courts of appeals' decisions collected in Appendix B to this Brief.

CONCLUSION

For the foregoing reasons, the State's cost-based policy options should be rejected in this forum, and the continued applicability of market-based fees for civil rights organizations should be reaffirmed. The judgment of the court below accordingly should be affirmed.

Respectfully submitted,

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APPENDICES

APPENDIX A

LODESTAR FEE COMPUTATION

DISTRICT OF COLUMBIA CIRCUIT: *Copeland v. Marshall*, 641 F.2d 880, 890-900 (D.C. Cir. 1980) (en banc) (Title VII); *see also, e.g., Donnell v. United States*, 682 F.2d 240, 249-55 (D.C. Cir. 1982) (Voting Rights Act); *National Treasury Employees Union v. Nixon*, 521 F.2d 317, 322 (D.C. Cir. 1975) (common fund).

FIRST CIRCUIT: *Furtado v. Bishop*, 635 F.2d 915, 919-20 (1st Cir. 1980) (§ 1988); *see also, e.g., Maceira v. Pagan*, 698 F.2d 38, 39-41 (1st Cir. 1983) (LMRDA); *Lamphere v. Brown University*, 610 F.2d 46, 47 (1st Cir. 1979) (Title VII).

SECOND CIRCUIT: *Detroit v. Grinnell Corp.*, 495 F.2d 448, 470-74 (2d Cir. 1974) (*"Grinnell I"*) (antitrust), and *Detroit v. Grinnell Corp.*, 560 F.2d 1093, 1098-1102 (2d Cir. 1977) (*"Grinnell II"*) (antitrust); *see also, e.g., Cohen v. West Haven Board of Police Commissioners*, 638 F.2d 496, 505-06 (2d Cir. 1980) (Revenue Sharing Act); *Mid-Hudson Legal Services v. G & U, Inc.*, 578 F.2d 34, 38 (2d Cir. 1978) (§ 1988); *Beazer v. New York City Transit Authority*, 558 F.2d 97, 100 (2d Cir. 1977) (§ 1988), *rev'd on other grounds*, 440 U.S. 568 (1979).

THIRD CIRCUIT: *Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 166-70 (3d Cir. 1973) (*"Lindy I"*) (antitrust common fund), and *Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 109-15 (3d Cir. 1976) (en banc) (*"Lindy II"*) (antitrust common fund); *see also, e.g., Pawlak v. Greenawalt*, 713 F.2d 972 (3d Cir. 1983) (common benefit under the LMRDA); *Prandini v. National Tea Co.*, 585 F.2d 47, 49 (3d Cir. 1978) (Title VII); *Hughes v. Repko*, 578 F.2d 483, 487-89 (3d Cir. 1978) (§ 1988); *Rodriguez v. Taylor*, 569 F.2d 1231,

1247 (3d Cir. 1977) (ADEA), *cert. denied*, 436 U.S. 913 (1978).

FOURTH CIRCUIT: *Anderson v. Morris*, 658 F.2d 246, 249 (4th Cir. 1981) (§ 1988); *see also, e.g., Disabled in Action v. Mayor & City Council of Baltimore*, 685 F.2d 881, 886 (4th Cir. 1982) (Rehabilitation Act).

FIFTH CIRCUIT: *Copper Liquor, Inc. v. Adolph Coors Co.*, 624 F.2d 575, 581-83 (5th Cir. 1980) (Clayton Act); *see also, e.g., Graves v. Barnes*, 700 F.2d 220, 221-24 (5th Cir. 1983) (Voting Rights Act); *cf., Johnson v. Georgia Highway Express*, 488 F.2d 714, 717-20 (5th Cir. 1974) (Title VII).

SIXTH CIRCUIT: *Louisville Black Police Officers Organization v. Louisville*, 700 F.2d 268, 273-81 (6th Cir. 1983) (§ 1988 and Title VII); *see also, Northcross v. Board of Education of Memphis*, 611 F.2d 624, 641-42 (6th Cir. 1979) (§ 1988), *cert. denied*, 447 U.S. 911 (1980).

SEVENTH CIRCUIT: *Waters v. Wisconsin Steel Works of Int'l Harvester*, 502 F.2d 1309, 1322 (7th Cir. 1974) (Title VII), *cert. denied*, 425 U.S. 997 (1976), and *Muscare v. Quinn*, 614 F.2d 577, 579 (7th Cir. 1980) (§ 1988); *see also, e.g., Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760, 763 n.5 (7th Cir. 1982) (Title VII); *Kamberos v. GTE Automatic Electric*, 603 F.2d 598, 603-04 (7th Cir. 1979) (Title VII), *cert. denied*, 454 U.S. 1060 (1981).

EIGHTH CIRCUIT: *Avalon Cinema Corp. v. Thompson*, 689 F.2d 137, 139-40 (8th Cir. 1982) (en banc) (§ 1988); *see also, e.g., Taylor v. Jones*, 653 F.2d 1193, 1205-06 (8th Cir. 1981) (§ 1988); *DiSalvo v. Chamber of Commerce of Greater Kansas City*, 568 F.2d 593, 599 (8th Cir. 1978) (Title VII).

NINTH CIRCUIT: *Brandenburger v. Thompson*, 494 F.2d 885, 890 n.7 (9th Cir. 1974) (private attorney general theory); *see also, e.g., White v. Richmond*, 713 F.2d 458

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TENTH CIRCUIT: *Ramos v. Lamm*, 713 F.2d 546, 551-58 (10th Cir. 1983) (§ 1988).

ELEVENTH CIRCUIT: *Fitzpatrick v. Internal Revenue Service*, 665 F.2d 327, 332 (11th Cir. 1982) (Privacy Act); *see also, e.g., Freeman v. Motor Convoy, Inc.*, 700 F.2d 1339, 1356 (11th Cir. 1983) (Title VII).

APPENDIX B

NO REDUCTION IN MARKET FEES FOR CIVIL RIGHTS ORGANIZATIONS

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FIRST CIRCUIT: *Palmigiano v. Garrahy*, 616 F.2d 598, 601-02 (1st Cir. 1980) (§ 1988) (ACLU), *cert. denied*, 449 U.S. 839 (1980); *see also, Reynolds v. Coomey*, 567 F.2d 1166, 1167 (1st Cir. 1978) (Title VII) (Legal Defense Fund).

SECOND CIRCUIT: *Carey v. New York Gaslight Club*, 598 F.2d 1253, 1255 n.1 (2d Cir. 1979) (Title VII) (NAACP), *aff'd*, 447 U.S. 54 (1980); *Beazer v. New York City Transit Authority*, 558 F.2d 97, 100 (2d Cir. 1977) (§ 1988) (Legal Action Center), *rev'd on other grounds*, 440 U.S. 568 (1979); *Torres v. Sachs*, 538 F.2d 10, 13-14 (2d Cir. 1976) (Voting Rights Act) (Puerto Rican Legal Defense Fund).*

THIRD CIRCUIT: *Rodriguez v. Taylor*, 569 F.2d 1231, 1250 (3d Cir. 1977) (ADEA) (Community Legal Services), *cert. denied*, 436 U.S. 913 (1978); *see also, Pawlak v. Greenawalt*, 713 F.2d 972 (3d Cir. 1983) (common benefit under the LMRDA) (Public Citizen Litigation Group).

FOURTH CIRCUIT: *Tillman v. Wheaton-Haven Recreation Ass'n*, 517 F.2d 1141, 1148 (4th Cir. 1975) (Title II) (ACLU).

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* These decisions have been overruled by Judge Newman's decision for the panel in *New York State Ass'n for Retarded Children v. Carey*, 711 F.2d 1136, 1148-52 (2d Cir. 1983).

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SIXTH CIRCUIT: *Louisville Black Police Officers Organization v. Louisville*, 700 F.2d 268, 276-78 (6th Cir. 1983) (§ 1988 and Title VII) (Legal Defense Fund); *Northcross v. Board of Education of Memphis*, 611 F.2d 624, 637-38 (6th Cir. 1979) (§ 1988) (Legal Defense Fund), *cert. denied*, 447 U.S. 911 (1980).

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NINTH CIRCUIT: *Dennis v. Chang*, 611 F.2d 1302, 1305-09 (9th Cir. 1980) (§ 1988) (Legal Aid Society of Hawaii).

TENTH CIRCUIT: *Ramos v. Lamm*, 713 F.2d 546, 551-52 (10th Cir. 1983) (§ 1988) (ACLU).

ELEVENTH CIRCUIT: *See* Fifth Circuit decisions binding on the Eleventh Circuit.

Amicus Brief

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No. 81-1374

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BARBARA BLUM,

Petitioner

v.

ELLEN STENSON,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR NATIONAL EDUCATION ASSOCIATION, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, AND MARY P. LAFFEY, AS AMICI CURIAE, IN SUPPORT OF RESPONDENT

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BRIEF FOR NATIONAL EDUCATION ASSOCIATION, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, AND MARY P. LAFFEY, AS AMICI CURIAE, IN SUPPORT OF RESPONDENT

This brief is filed with the written consent of the parties; the consents are lodged with the Clerk.

INTEREST OF THE AMICI CURIAE

The National Education Association (NEA) is the largest public employee organization in the United States, with approximately 1.7 million members, virtually all of whom are employed by public educational institutions.

The American Federation of Teachers, AFL-CIO (AFT) is a national labor organization with approxi-

mately 500,000 members, a majority of whom are employed by public educational institutions.

The members of NEA and AFT have frequent occasion to institute suits under 42 U.S.C. 1983 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, and both NEA and AFT have as an important purpose assisting their members in these endeavors. This is accomplished in part through the furnishing of legal services of staff attorneys employed by the organizations, but in far greater part by referral of members to attorneys in private practice who have indicated a willingness to undertake § 1983 and Title VII litigation on a reduced-fee basis—reflecting the incapacity of their clients to pay market rates—in anticipation that if the plaintiff prevails there will be a fee award that is determined by market criteria. The members of NEA and AFT have a strong interest in assuring that the standards governing fee awards under 42 U.S.C. § 1988 and Title VII be such as will insure the availability of qualified attorneys willing to undertake such litigation on their behalf.

Mary P. Laffey is the lead plaintiff and class representative in *Laffey* v. *Northwest Airlines, Inc.*, a sex discrimination class action under the Equal Pay Act of 1963, 29 U.S.C. § 206(d), and Title VII. The suit, which has been actively litigated for more than 13 years, has resulted in a final judgment that, *inter alia*, awards $52.4 million in backpay, prejudgment interest and liquidated damages to 3,364 class members, 32 FEP Cases 758 (D.D.C. 1982), a judgment from which appeals are now pending. The action has also resulted in an award of attorneys' fees and litigation expenses pursuant to the statutory fee provisions of the Equal Pay Act and Title VII, 32 FEP Cases 770 (D.D.C. 1983), an award that likewise is pending on appeal. The disposition by this Court of the instant case could have an effect upon the latter award.[1]

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[1] The firm principally responsible for the preparation of this amici curiae brief, Bredhoff & Kaiser, represents the plaintiff class

SUMMARY OF ARGUMENT

1. Congress has clearly manifested its intent to adopt a market-rate, rather than a cost-based, method of determining fee awards under § 1988. In enacting the 1976 fee statute, Congress was not writing on a blank slate. By that time courts had undertaken the task of setting fees in a huge volume of civil rights cases. None of the decided cases at that time had adopted, or from all that appears even considered, a cost-based approach to setting fees. Rather, the universal practice was to use the market value of the services rendered as the benchmark for determining a reasonable fee.

In developing a methodology for determining the market rate, decisions prior to the passage of the 1976 Act, including *Johnson* v. *Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974), turned to the factors set down by the American Bar Association for determining what is a "reasonable" fee in the market. In enacting § 1988, Congress did not express any dissatisfaction with this body of established case-law. To the contrary, Congress expressly embraced the market-based approach developed in *Johnson* and cases like it. And these market-based criteria were integral to achieving Congress' objective in enacting § 1988: fee awards under § 1988 are intended to ensure that civil rights cases will carry their weight in the market palce and not be treated as second class litigation.

Petitioner and the Solicitor General do not cite a single instance in the legislative history of the Act in which Congress even considered—much less approved—a cost-based approach to setting fee awards. In fact, the legislative materials are barren of any such reference.

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in *Laffey, supra*; represents teachers and other public employees in actions to which the fee provision of 42 U.S.C. § 1988 is applicable; and represents plaintiffs in other Equal Pay Act and Title VII cases.

Nor did Congress opt for a "market-rate" approach under which fees for civil rights cases would be lower than those for commercial legal services, *i.e.*, in which fees would be determined by what the "market" of civil rights plaintiffs were able to pay their lawyers. Precisely because the fees available from civil rights plaintiffs had been inadequate to attract attorneys in sufficient numbers, Congress mandated fee awards that would make civil rights lawsuits fully competitive in the marketplace with other litigation of equal complexity.

2. Congress expressly contemplated that the factor of risk be taken into account in setting fee awards and that that factor is not a "bonus" but an integral part of a reasonable, market fee. The factors Congress decided should be applied in determining the amount of fee awards included "whether the fee is fixed or contingent." And were that factor—the risk factor—not taken into account in setting fees in civil rights cases, those cases simply could not carry their weight in the market place. As the Solicitor General acknowledges "'[n]o one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his service, regardless of success.'" Brief for the United States at 19 (quoting *Cherner* v. *Transition Electronic Corp.*, 221 F. Supp. 55, 61 (D. Mass. 1963)).

The Solicitor General's brief contends that to adjust for the risk of losing a case is in effect "indistinguishable" from compensating a lawyer for cases in which he does not prevail. Brief for the United States at 17. That contention simply misses the point. The risk adjustment is designed to meet a reality of the market place: lawyers charge more for cases in which their compensation depends upon success than in non-contingent cases where fees are billed and collected on a regular basis.

3. Petitioner and the Solicitor General contend that even if the market rate determined by application of ABA criteria is applicable in § 1988 cases when the plaintiffs' lawyer is generally engaged in the private practice of law on a "for-profit" basis, that rate should not obtain when the fee applicant is a salaried lawyer employed by a non-profit organization. This contention of petitioner and the Solicitor General flies in the face of the intent of Congress as clearly manifested in the legislative materials. Congress was fully cognizant of the fact that lawyers with myriad different types of practices would become fee applicants under § 1988, including lawyers employed by non-profit organizations. Yet, Congress prescribed a single set of criteria for determining fee awards in all cases—the *Johnson* factors—which criteria were "derive[d]" (*Hensley* v. *Eckerhart*, 103 S.Ct. 1933, 1937 n.3 (1983)) from the ABA standards for determining fees for for-profit lawyers. Nowhere did Congress indicate that some other, unspecified criteria were to apply when salaried lawyers for non-profit organizations—or other lawyers who by reason of the clientele they have chosen to represent, and not by reason of lesser skill or experience, charge below market rates—are the fee applicants. Indeed, Congress affirmatively expressed its intent that the same standards for determining fees be applicable to all lawyers, including salaried lawyers for non-profit organizations.

These legislative materials settle this issue. Congress determined that there is an objectively ascertainable value that the market would place upon the services of a plaintiff's lawyer in each case. That value is determined by application of the *Johnson* factors. And it is the same value, all other things being equal, whether the lawyer performing the services is salaried, or performed the services for social rather than economic motivation, or handled the case solely to make a profit.

In the face of these definitive legislative materials, petitioner and the Solicitor General are able only to lift the word "windfall" out of context from the congressional reports and to make the bald assertion that non-profit lawyers would receive a "windfall" if paid the market value of their services. But when the word "windfall" is seen in the context in which Congress used it, there can be no doubt that the definition of the word asserted by petitioner and the Solicitor General is not the definition intended by Congress. The words of the House Report define the term "windfall." A "windfall" is a fee that exceeds the "reasonable fee" arrived at by application of the *Johnson* criteria. Moreover, even without such clear expressions of congressional intent, the concept of "windfall" proposed by petitioner and the Solicitor General leads to a result that no Congress would likely embrace. It is simply not a windfall to award a lawyer a fee determined by the market value of his services.

4. While all fee applicants under § 1988 are entitled to a fee determined by market based standards, that does not mean that all lawyers are entitled to the same fee, much less that all lawyers are entitled to the highest level of fees charged in the community. Just as the market sets different fees for different lawyers according to their skill and experience, so should a court in setting the lodestar rate under § 1988. The burden is on the fee applicant to establish both the level of his experience, reputation and ability and the prevailing community rate for lawyers with comparable qualities. *Copeland* v. *Marshall*, 641 F.2d 880 (D.C. Cir. 1980) (en banc) and its progeny provide the proper methodology for carrying out § 1988's mandate to provide attorneys in civil rights cases compensation at the market value of their services.

ARGUMENT

1. Petitioner and the Solicitor General present in elaborate detail proposed approaches to determining the amount of fees to be awarded in cases covered by the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. (Supp. V.) § 1988. All of their proposed approaches are variations of a cost-based method of determining fees. As a matter of policy, the wisdom of such a method is, to say the least, debatable. See the various opinions in *Copeland* v. *Marshall*, 641 F.2d 880 (D.C. Cir. 1980) (*en banc*). But the issue here is not one of policy. Rather, as *Copeland* recognized, *id.* at 897, the issue is one of congressional intent. We begin by showing that Congress clearly manifested its intent that a market-rate, rather than a cost-based, method be used by the courts in determining fee awards under § 1988.[2]

In enacting the 1976 fee statute, Congress was not writing on a blank slate. By that time courts had undertaken the task of setting fees in a huge volume of civil rights cases decided under Title VII of the Civil Rights Act of 1964 and under the judicially-established "private attorney general" theory that prevailed prior to *Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U.S. 240 (1975). Indeed, what prompted enactment of § 1988 was the need, after *Alyeska*, for congressional adoption of a fee statute in order for attorney's fees to continue to be available in civil rights cases not brought under the 1964 Act. None of the decided cases at that time had adopted, or from all that appears even considered, a cost-based aproach to setting fees. Rather, the universal practice was to

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[2] Congress made clear that the standards for determining the amount of fee awards in § 1988 cases are the same as the standards to be applied in setting fees under the Civil Rights Act of 1964 and under the antitrust laws. S. Rep. No. 94-1011, 94th Cong., 2nd Sess. (1976) at 2, 4, 6; H. Rep. No. 94-1558, 94th Cong., 2nd Sess. (1976) at 1, 5, 8-9. See also *Hensley* v. *Eckerhart*, —— U.S. ——, ——, 103 S. Ct. 1933, 1939 n.7 (1983). And see pp. 11-12, *infra*.

use the market value of the services rendered as the benchmark for determining a reasonable fee.[3]

Determination of market value was to some extent necessarily a construct. For example, while a court award of fees in all these cases was contingent upon success, and in most cases a court award was the only source of fees, the traditional market device for accounting for the risk of non-success—a fee based on a percentage of the plaintiff's recovery—did not fit the situation, because in many civil rights cases the relief sought was largely or wholly injunctive relief, not monetary relief. And, as another example, many of the lawyers representing plaintiffs in civil rights cases had no established rate in the market or represented a type of clientele that paid below-market rates. In developing a construct for determining market-based fees, decisions prior to the passage of the 1976 Act, including *Johnson* v. *Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974), turned to the factors set down by the American Bar Association for determining what is a "reasonable" fee in the market place. Those ABA factors were:

> (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
>
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

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[3] *See, e.g., Johnson* v. *Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974); *Brandenburger* v. *Thompson*, 494 F.2d 885, 890 n.7 (9th Cir. 1974); *Waters* v. *Wisconsin Steel Works*, 502 F.2d 1309, 1322 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976); *Evans v. Sheraton Park Hotel*, 503 F.2d 177 (D.C. Cir. 1974); *Estien* v. *Christian*, 507 F.2d 61 (3rd Cir. 1975); *Doe* v. *Poelker*, 515 F.2d 541, 548 (8th Cir. 1975), *reversed on other grounds*, 432 U.S. 519 (1977); *Tillman* v. *Wheaton-Haven Recreation Ass'n*, 517 F.2d 1141, 1148 (4th Cir. 1975); *Kerr* v. *Screen Extras Guild, Inc.*, 526 F.2d 67, 69-70 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976); *Torres* v. *Sachs*, 538 F.2d 10 (2nd Cir. 1976).

(2) *The fee customarily charged in the locality for similar legal services.*

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) *Whether the fee is fixed or contingent.*" [4]

In enacting § 1988, Congress did not express any dissatisfaction with this body of established case-law. To the contrary, Congress expressly embraced the market-based approach as developed in *Johnson* and cases like it. Thus, the Senate Report (S. Rep. No. 94-1011, 94th Cong., 2nd Sess. (1976)) declared:

> It is intended that the amount of fees awarded under [§ 1988] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases and not be reduced because the rights involved may be non-

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[4] The American Bar Association Code of Professional Responsibility, Disciplinary Rule 2-106(B) (emphasis added), quoted in *King* v. *Greenblatt*, 560 F.2d 1024, 1027 n.6 (1st Cir. 1977), *cert. denied*, 438 U.S. 916 (1978).

It is significant that, contrary to the assertion of petitioner (p. 18) that in the private market fees are set based on the actual costs to a firm of providing the services, the ABA factors do not mention costs. Indeed, the assertion in petitioner's brief reveals a lack of understanding of the way the private market works. In the private market, fees are a function of the play of supply and demand, with prevailing rates in the community for similar services by lawyers of similar skill and experience thus being a prime factor. Costs are determinative of profit margin, not of the fee charged; the more cost efficient firms may charge the same fees, but will achieve a greater return on their investment of time and resources.

> pecuniary in nature. The appropriate standards, see *Johnson* v. *Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974), are correctly applied in such cases as *Stanford Daily* v. *Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974); *Davis* v. *County of Los Angeles*, 8 E.P.D. § 9444 (C.D. Cal. 1974); and *Swann* v. *Charlotte-Mecklenburg Board of Education*, 66 F.R.D. 483 (W.D.N.C. 1975). [S. Rep. No. 94-1011, *supra*, at 6].

The House Report (H. Rep. No. 94-1558, 94th Cong., 2nd Sess. (1976)) similarly stated:

> The third principal element of the bill is that the prevailing party is entitled to "reasonable" counsel fees. The courts have enumerated a number of factors in determining the reasonableness of awards under similarly worded attorney's fee provisions. In *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), for example, the court listed twelve factors to be considered, including the time and labor required, the novelty and difficulty of the questions involved, the skill needed to present the case, the customary fee for similar work, and the amount received in damages, if any. *Accord*: *Evans* v. *Sheraton Park Hotel*, 503 F.2d 177 (D.C. Cir. 1974) . . . [H. Rep. No. 984-1558, *supra*, at 8].

In *Hensley* v *Eckerhart*, —— U.S. ——, 103 S. Ct. 1933 (1983), this Court summarized the *Johnson* factors referred to in the Senate and House Reports as follows:

> The twelve factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and

(12) awards in similar cases. [103 S. Ct. at 1937 n. 3].

During the floor debates leading to enactment of § 1988, the sponsors consistently recited the same criteria as controlling. *See, e.g., Source Book*[5] at 138-139 (Sen. Tunney, the author of the bill); *id.* at 255 (Rep. Drinan, the manager of the bill in the House).

As this Court recognized in *Hensley, supra*, 103 S. Ct. at 1937 n.3, the *Johnson* factors "derive directly" from the ABA standards—standards that are guides to determining "reasonable" fees in the market-place. Congress thus adopted the criteria of the market-place as the standard for computing fees under § 1988. And these market-based criteria were integral to achieving Congress' objective in enacting § 1988: repeatedly, the sponsors and supporters of the bill stated that fee awards under the bill are intended to ensure that civil rights cases will carry their weight in the market place and not be treated as second class litigation. "It is intended that the amount of fees awarded under [§ 1988] be governed by the same standards which prevail in equally complex Federal litigation, such as antitrust cases and not be reduced because the rights involved may be nonpecuniary in nature." S. Rep. No. 94-1011, *supra* at 6. "Under the antitrust laws . . ., a plaintiff may recover treble damages and still the court is required to award attorney fees. The same principle should apply here as civil rights plaintiffs should not be singled out for different and less favorable treatment." H. Rep. No. 94-1558, *supra*, at 8-9. Representative Seiberling, a principal sponsor, explained to the House:

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[5] We use "Source Book" to refer to *Civil Rights Attorney's Fees Awards Act of 1976, Source Book: Legislative History, Texts, and Other Documents*, prepared by the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 94th Cong., 2nd Sess. (1976).

> We recently passed, and the President signed yesterday, an antitrust act which contains a similar provision with respect to attorneys' fees in private antitrust cases. As a matter of fact, without such a provision, the effect of the Alyeska pipeline court decision would be to wipe out the "private attorneys general" concept in the enforcement of the antitrust laws.
>
> Now, certainly the laws protecting people's civil and constitutional rights are at least as important as are antitrust laws. All we are trying to do in this bill is to provide for uniform treatment . . . [*Source Book*, *supra*, at 245].

See also, *id.* at 263 (Rep. Kastenmeier) ("What higher priority exists than in the civil rights area?"); *id.* at 270 (Rep. Seiberling) ("The civil rights laws are not less important than the antitrust laws, so we should give civil rights victims the same protection we give antitrust victims").

Petitioner and the Solicitor General do not cite a single instance in the legislative history of the Act in which Congress even considered—much less approved—a cost-based approach to setting fee awards. In fact, the legislative materials are barren of any such reference.

Following passage of § 1988, the courts of appeals have with a single exception uniformly recognized that Congress intended the continuation of the market-based approach that had pre-existed enactment of that provision.[6]

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[6] *See, e.g., Copeland* v. *Marshall*, 641 F.2d 880 (D.C. Cir. 1980) (en banc); *Furtado* v. *Bishop*, 635 F.2d 915, 919-920 (1st Cir. 1980); *Rodriguez* v. *Taylor*, 569 F.2d 1231 (3rd Cir. 1977), *cert. denied*, 436 U.S. 913 (1978); *Anderson* v. *Morris*, 658 F.2d 246 (4th Cir. 1981); *Graves* v. *Barnes*, 700 F.2d 220 (5th Cir. 1983); *Northcross* v. *Board of Education*, 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980); *Chrapliwy* v. *Uniroyal, Inc.*, 670 F.2d 760 (7th Cir. 1982), *cert. denied*, 103 S.Ct. 2428 (1983); *Avalon Cinema Corp.* v. *Thompson*, 689 F.2d 137 (8th Cir. 1982) (en banc); *Dennis* v. *Chang*, 611 F.2d 1302 (9th Cir. 1980); *Battle* v. *Anderson*, 614 F.2d 251, 256-259 (10th Cir. 1980).

The single exception is *New York State Association For Retarded Children, Inc.* v. *Carey*, —— F.2d ——, No. 82-7531 (2nd Cir., June 15, 1983), an opinion by a divided panel of the same court of appeals that decided the instant case, which conflicts not only with the decision in the instant case but with several other decisions of that court.[7] As we have shown, that panel endorsement of a cost-based approach is bereft of any support in the legislative materials and conflicts with Congress' clearly expressed intent.

Nor did Congress opt for a "market-rate" approach under which fees for civil rights cases would be lower than those for commercial legal services, *i.e.*, in which fees would be determined by what the "market" of civil rights plaintiffs were able to pay their lawyers. The very reason for enactment of the statute was that the fees available from civil rights plaintiffs had been inadequate to attract attorneys in sufficient numbers. Congress' solution was to mandate fee awards that would make civil rights lawsuits fully competitive in the marketplace with other litigation of equal complexity;[8] to recall again the

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[7] *See, e.g., Cohen* v. *West Haven Board of Police Commissioners*, 638 F.2d 496, 505-506 (2nd Cir. 1980), and cases cited therein.

[8] Petitioner notes that Congress, in the Equal Access to Justice Act of 1980, imposed a maximum rate of $75 per hour for cases covered by that Act Pet. Br. 29 n.**. But, advisedly, petitioner does not even suggest that this reflects the view of a later Congress that there *ought* to have been a $75 cap on fees under the civil rights statutes. For the view of the 1980 Congress was clearly expressed in the reports accompanying the Equal Access to Justice Act:

> The definition establishes that fees are to be based on the prevailing market rate for the kind and quality of services rendered. However, no attorney or agent may be compensated at a rate in excess of $75 per hour unless special factors justify a higher fee . . . *This section is not intended to affect or limit the computation of reasonable attorney fees under any other provision of law authorizing an award of fees for litigation under a particular statute, such as the Civil Rights Acts, de-*

words of the House Report, "[i]t is intended that the amount of fees awarded under [§ 1988] be governed by the same standards which prevail in equally complex Federal litigation, such as antitrust cases" (*supra*, p. 11).[9]

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signed to promote private enforcement of that Act. [H. Rep. No. 96-1418, 96th Cong., 2nd Sess. (1980) at 14-15, emphasis added. Accord: S. Rep. No. 96-253, 96th Cong., 1st Sess. (1979) at 16.]

[9] The Solicitor General's brief (p. 26) cites three passages in the Hearings before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary, 94th Cong. 1st Sess. (1975) (hereinafter *Hearings*) that the brief contends "would have given Congress reason to expect that the fees awarded under the Act generally would be less than prevailing market rate for commercial legal services." Not mentioned in that brief is the testimony at those Hearings of Rex E. Lee, then Assistant Attorney General of the Civil Division of the United States Department of Justice, who presented "the views of the Department of Justice" (*Hearings* at 175). He explained the manner in which he anticipated the courts would calculate fees were the bill enacted:

> [I]t is my opinion that in those instances where attorneys' fees are awarded, then the testimony that is presented to the courts in support of an attorney's fees awarded [sic] would approach the generally prevailing hourly rates, generally prevailing in the community.
>
> So, I think you would probably be looking at the $75 to $100 an hour range, or whatever it is that prevails in the particular community. [*Hearings*, at 180-181].

The rates referred to were of course at 1975 levels. Similar testimony was presented by other witnesses. *Id.* at 121 (Charles Halpern), 146 (Bruce Terris), 151-152 (Henry L. Marsh, III).

The passages cited in the Solicitor General's brief (at p. 26) do not support a contrary inference as to legislative intent. One consists of the testimony of Bruce Terris that in order to represent persons in the fields he has chosen to practice in—"environmental, employment, and civil liberties cases"—in the absence of a fee statute "[m]y office bills at between $30 and $40 an hour, which is far below the market rate in the District of Columbia," yet even at those rates "there are few persons or even organizations which can afford such costs" and "[a]s a result, numerous cases to enforce

2. Petitioner and the Solicitor General both argue that § 1988 does not permit what they term a "bonus award"

Federal statutes are not brought simply because of lack of funds." (*Hearings*, at 140). That Terris was not suggesting that the bill would or should produce fees based on rates below commercial market rates is evident from the portion of his testimony discussing "the criteria" that should be used in calculating fee awards (*id.* at 146):

> [T]he ordinary commercial rate for lawyers in the community; the fact of a case being on a contingent basis, which would normally increase the fee that would be payable; as well as other criteria, such as the performance of the lawyer, complexity of the case. Many of those criteria, by the way, are spelled out in various cases involving attorneys' fees which have been litigated in the District of Columbia Circuit and other circuits all over the country. [*Ibid.*].

The Solicitor General's brief also cites Representative Wiggins' inquiry to a witness at the hearing—prompted by an ABA resolution advocating that in the *absence* of fee-shifting lawyers should furnish "public interest legal services . . . without fee or at a substantially reduced fee"—whether "the reasonable attorney's fee fixed [by the bill] should be reduced to accommodate the professional duty which the bar holds to a certain class of litigants" (*Hearings* at 76). The witness responded that the very reason the bill was needed was that, despite the ABA's urging, in the absence of adequate fees lawyers were *not* available in sufficient numbers to civil rights plaintiffs (*ibid.*)—a point with which Representative Wiggins appears not to have disagreed (*id.* at 76-78).

Finally, the Solicitor General's brief suggests that the testimony of Philip Mause indicates the witness' belief that Covington & Burling rates would not be awarded. That was not at all the witness' point. Rather, the witness was explaining that the bill should vest in the trial judge control over the reasonableness of the amount of fees, so that the winning party's law firm could not simply "send its bill to the losing party" without judicial appraisal of its reasonableness. (*Hearings* at 227).

Petitioner cites an observation of Senator Kennedy—that "[w]e are not talking about the kind of attorneys' fees that were included in the antitrust bill. You do not get rich from protecting civil rights of citizens" (*Source Book, supra*, at 92, quoted in Br. Pet. 38)—and draws the conclusion that despite the definitive legislative materials cited at pp. 11-12, *supra*, the "market rate" is to be lower

based on the fact that a plaintiff's lawyer has borne the risk that the case might be lost and that his efforts might ultimately go uncompensated. As we now show, Congress expressly contemplated that the factor of risk be taken into account in setting fee awards, and viewed that factor not as a "bonus" but as an integral part of a reasonable, market based fee.[10]

We have already shown that the factors Congress decided should be applied in determining the amount of fee awards included "whether the fee is fixed or contingent" —a factor recited by this Court in *Hensley*. See *supra* pp. 10-12.[11] And were that factor—the risk factor—not

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in civil rights than in antitrust cases. Petitioner misunderstands Senator Kennedy's reference. He was responding to Senator Allen's lament that the Senate, in considering the antitrust bill, had refused Senator Allen's proposal that the statutory fee award be *in lieu* of (rather than in addition to) the huge percentage-of-recovery fees that antitrust lawyers often secured by agreement with their clients (*Source Book, supra*, 89-90). As Senator Kennedy later explained, "civil rights cases—unlike tort or antitrust cases—do not provide the prevailing plaintiff with a large recovery from which he can pay his lawyer" (*id.* at 200); "[i]n the traditional contingency case [in contrast to civil rights cases], the lawyer is assured of a high percentage of a monetary award should he win" (*id.* at 201).

[10] Curiously, the Solicitor General states the issue in terms of whether "a bonus award of attorney's fees, in addition to compensation at a reasonable rate for hours reasonably expended by counsel, is . . . improper." Brief for the United States at 6. That formulation begs the question. The question is not whether a bonus should be given on top of what is already a "reasonable" fee. The question is rather whether Congress intended risk to be one of the factors taken into account in determining what *is* a "reasonable" fee.

[11] As *Hensley* also noted, 103 S. Ct. at 1937-38, the Senate Report stated that the *Johnson* factors had been "correctly applied" in, *inter alia*, *Stanford Daily* v. *Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974), affirmed, subsequent to enactment of the 1976 Act, 550 F.2d 464 (CA 9 1977), rev'd on other grounds, 436 U.S. 547 (1978). In *Stanford*, the district court had explained that "[f]ederal court decisions generally reason that the amount of any award of attorneys' fees should reflect any contingencies which stood be-

taken into account in setting fees in civil rights cases, those cases simply could not carry their weight in the market place. As the Solicitor General acknowledges "'[n]o one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success.'" Brief for the United States as 19 (quoting *Cherner* v. *Transition Electronic Corp.*, 221 F. Supp. 55, 61 (D. Mass. 1963).

Since the passage of the 1976 Act courts have refined the methodology for applying the *Johnson* factors, to give more structure to the setting of fee awards and thereby to ensure that only the proper factors are considered and that each factor is given only its proper weight. This refinement divides the *Johnson* factors into two separate categories: those that pertain to setting what has become known as the "lodestar"; and those that pertain to whether the lodestar should be adjusted upward or downward. Virtually every circuit has adopted this two-stage approach, with minor variations.[12] The most comprehensive exposition of the approach is found in *Copeland* v. *Marshall*, 641 F.2d 880 (D.C. Cir. 1980) (*en banc*), which was cited with approval in *Hensley*, 103 S. Ct. at 1940, n.9.[13]

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tween the attorneys and their deserved fee" (*id.* at 685, citing cases); had noted that "[t]hese decisions parallel the American Bar Association's determination that attorneys deserve higher compensation for contingent than for fixed-fee work" (*ibid.*, citing Rule 2-106(B)-8); and had concluded that courts "must increase" the amount derived by multiplying compensable hours times fixed-fee hourly rates "to reflect the fact that the attorneys' compensation . . . was contingent in nature" (*id.* at 686).

[12] Derfner & Wolf, *Court Awarded Attorneys Fees* ¶ 15.03 (Matthew Bender, 1983).

[13] The *Copeland* approach has been further refined—in terms of evidentiary requirements and specificity of district court findings—in *National Association of Concerned Veterans* v. *Secretary of De-*

The *Copeland* approach accounts for the risk factor in a manner designed to assure that the overall fee will carry its weight in the market place, but no more. The first stage of the *Copeland* inquiry—the lodestar stage—requires the determination of the prevailing hourly rate in the community for similar work by lawyers of comparable skill and experience. *Copeland*, 641 F.2d at 891-892. The lodestar is calculated by multiplying that hourly rate by the number of attorneys hours found to have been reasonably expended in securing the successful outcome. But, as *Copeland* recognized, the amount thus derived—the lodestar—is not a fee that would result in the market *for a contingent case*. The hourly rate used to calculate the lodestar is that charged by lawyers who are promised payment of their fees regardless of whether they ultimately prevail in a case, and who receive payment of fees on a regular periodic billing basis and not at the very end of litigation which may go on for years. In the market place, a lawyer would not charge the same hourly rate for cases in which fees are to be paid on a regular basis regardless of success and cases in which fees will be paid only if his client prevails and then only after the case has been concluded.

The second stage of the *Copeland* analysis is designed to make the adjustments in the lodestar necessary to achieve congruence with the rate that would emerge in the market place. In civil rights cases, which tend to be undertaken on a wholly contingent basis, the adjustment for the "contingent nature of success" (*Copeland*, 641 F.2d at 892-893) is normally the most critical of the adjustments at this stage.[14] The Solicitor General's brief

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fense, 675 F.2d 1319 (D.C. Cir. 1982); *Donnell* v. *United States*, 682 F.2d 240 (D.C. Cir. 1982), *cert. denied*, 103 S. Ct. 1190 (1983).

[14] As *Hensley* recognizes, "results obtained" may be another factor calling for an upward or downward adjustment at the second stage, 103 S. Ct. at 1940, for that is a factor that in the market place may affect the ultimate fee charged and paid. See ABA Rule 2-106(B)-4, quoted at p. 9, *supra*. See also *Copeland*, 641 F.2d at 893-894.

contends that to adjust for the risk of losing a case is in effect "indistinguishable" from compensating a lawyer for cases in which he does not prevail. Brief for the United States at 17. That contention simply misses the point. The risk adjustment is designed to meet a reality of the market place: lawyers charge more for cases in which their compensation depends upon success than in non-contingent cases where fees are billed and collected on a regular basis. Indeed, at another point in his brief the Solicitor General acknowledges that reality. *Id.* at 19 (quoted *supra* p. 17).

A simple example illustrates the point. A lawyer's normal rate for non-contingent work billed and collected on a monthly basis is $100 per hour. He has more than sufficient non-contingent work available at that rate to fill up his available time. He is asked to take a case on a contingent basis. To make a rational economic decision whether to take the case he must determine at the outset whether the fee if he prevails would be sufficient to justify his foregoing the $100 per hour he would otherwise earn for the time he would have to devote to the case. If he reasonably determines that the case has a 50% chance of success, a rate of return double his normal hourly rate would be required, on a purely economic basis, to induce him to take the case. The additional $100 per hour is not compensation for losing some other case, as the government contends; it is, rather, the adjustment necessary to make *this* contingent case economically competitive with non-contingent cases. In other words, this adjustment is necessary so that the contingent case can carry its weight in the market place. See Berger, *Court Awarded Attorneys' Fees: What is "Reasonable"?*, 126 U. Pa. L. Rev. 281, 324-26 (1977).

3. Once the lodestar is adjusted as necessary to reflect additional factors that operate in the market place, a constructed market rate is achieved. Petitioner and the Solicitor General nevertheless contend that even if that

rate were appropriate when the plaintiffs' lawyer is generally engaged in the private practice of law, that rate should not obtain when the fee applicant is a salaried lawyer employed by a non-profit organization. Pet. Br., at 27; Brief for the United States at 21, 22-27. According to petitioner and the Solicitor General, to award such salaried lawyers a fee based on their market value would be to grant them the kind of "windfall" that Congress meant to avoid. *Ibid.* As we now show, the contention of petitioner and the Solicitor General, once again, flies in the face of the intent of Congress as clearly manifested in the legislative materials.

Congress was fully cognizant of the fact that lawyers with myriad different types of practices would become fee applicants under § 1988. In the hearings held by the House, testimony was taken from numerous lawyers employed by non-profit organizations as well as lawyers who practiced on a private for-profit basis but who charged below market fees because of the nature of the clientele they chose to represent. *Hearings*, *supra*, at 97-99, 140, 149, 157-164. Further, as the reports in both houses reflect, Congress was aware of the large body of cases in which the fee applicants had been lawyers of these types. See *infra*, pp. 21-23. Yet, Congress prescribed a single set of criteria for determining fee awards in all cases—the *Johnson* factors—which criteria were as we have discussed "derive[d]" (*Hensley*, 103 S. Ct. at 1937 n. 3) from the ABA standards for determining fees for for-profit lawyers, *supra*, pp. 8-9, 11). Nowhere did Congress indicate that some other, unspecified criteria were to apply when salaried lawyers for non-profit organizations are the fee applicants.

Indeed, Congress went still further to manifest its intent that the same standards for determining fees be applicable to all lawyers, including salaried lawyers for non-profit organizations. The reports in each house showed an awareness, and signified congressional adoption, of decisions expressly declaring that the amounts of

fees were not to be reduced in the case of salaried employees of non-profit organizations. The Senate Report recited that the relevant factors had been "correctly applied" in, *inter alia*, *Davis* v. *County of Los Angeles*, 8 E.P.D. ¶ 9444 (C.D. Cal. 1974). (S. Rep. No. 94-1011, at p. 6; *Hensley*, 103 S. Ct. at 1937-38). In *Davis*, the court had held:

> In determining the amount of the fees to be awarded, it is not legally relevant that plaintiffs' counsel . . . are employed by the Center for Law In the Public Interest, a privately funded non-profit public interest law firm. It is in the interest of the public that such law firms be awarded reasonable attorneys' fees to be computed in the traditional manner when its counsel perform legal services otherwise entitling them to the award of attorneys' fees. *Clark* v. *American Marine Corporation*, 437 F.2d 959 (5th Cir. 1971), adopting 320 F. Supp. 709, at 711 (E.D. La. 1970); *Miller* v. *Amusement Enterprises, Inc.*, 426 F.2d 534 at 538-9 (5th Cir. 1970); *La Raza Unida* v. *Volpe*, 57 F.R.D. 94 at 98, Ft. 6 (N.D. Cal., 1972). [8 E.P.D. ¶ 9444 at 5048-49].

The House Report cited three cases reflecting its determination that "a prevailing party is entitled to counsel fees even if represented by an organization or if the party is itself an organization" (H. Rep. No. 94-1558, *supra*, at 8 n. 16). While one of the cases cited involved only *entitlement* to fees, and did not address the *measure* of such fees,[15] the other two expressly held that whether the attorney is a salaried employee or is in private practice is irrelevant in computing the amount of the fee. In one of the cited cases, *Fairley* v. *Patterson*, 493 F.2d 598 (5th Cir. 1974), the district court had limited the amount of the fee award because "the funds would flow into the 'coffers of the [Lawyers' Committee for Civil Rights Under Law]'" *Id.* at 606 & n. 12. The Court of

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[15] *Incarcerated Men of Allen County* v. *Fair*, 507 F.2d 281 (6th Cir. 1974).

Appeals, in the opinion cited in the House Report, had reversed, declaring:

> This is an impermissible rationale to use in determining the amount of attorneys' fees and expenses. This Court has indicated on several occasions that allowable fees and expenses may not be reduced because appellants' attorney was employed or funded by a civil rights organization and/or tax exempt foundation or because the attorney does not exact a fee. [493 F.2d at 606, citing cases] [16]

In the third of the cases cited in the House Report, *Torres* v. *Sachs*, 69 F.R.D. 343 (S.D.N.Y. 1975), *aff'd*, 538 F.2d 10 (2nd Cir. 1976),[17] the district court had awarded an attorney employed as Legal Director of the Puerto Rican Legal Defense Fund a fee based on the hourly rate charged by New York law firms for the services of lawyers of comparable experience, explaining that the rate had been derived, *inter alia*, "after inquiry into 'the hourly amount to which attorneys of like skill in the area could typically be entitled . . .'." 69 F.R.D. at 346 n. 1.[18] On appeal, the Second Circuit affirmed, squarely rejecting the defendant-city's contention that where "publicly financed legal services organizations supply counsel . . . some measure of fees should be used less than the going rates for similar services received by pri-

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[16] The Court further declared in *Fairley*:

> Whether the attorney charges a fee or has an agreement that the organization that employs him will receive any awarded attorneys' fees are not bases on which to deny or limit attorneys' fees or expenses. [493 F.2d at 607, citing cases.]

[17] The citation appears in the House Report (at p. 8 n.16) as "*Torres* v. *Sachs*, 69 F.R.D. 343 (S.D.N.Y. 1975), aff'd, —— F.2d —— (2d Cir., June 25, 1976)," reflecting that the appellate decision, although known to the House Committee, had not yet been reported.

[18] The Solicitor General's brief thus errs in stating that the district court in *Torres* did "not address the *measure* of fees for such parties [i.e. parties represented by non-profit legal services organizations]." Brief for the United States, pp. 25-26 n.20.

vately employed counsel for work of comparable importance, extent and complexity." 538 F.2d at 11.[19]

These legislative materials settle the issue. Congress determined that there is an objectively ascertainable value that the market would place upon the services of a plaintiff's lawyer in each case. That value is determined by application of the *Johnson* factors. It is the value necessary to make plaintiffs' civil rights cases as a class carry their weight in the market place. And it is the same value, all other things being equal, whether the lawyer performing the services is salaried, or performed the services for social rather than economic motivation, or handled the case solely to make a profit. Congress did not, contrary to the suggestions of petitioner (Br. at 33) and the Solicitor General (Br. at 21), mandate an individualized inquiry in each case as to what fee was necessary to entice the particular fee applicant before the court to undertake the case. Not one of the *Johnson* factors is addressed to such an inquiry. Whether or not a particular lawyer required any economic incentive, Congress mandated that he be entitled to a fee at the same

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[19] *Torres* involved the fee provision of the Voting Rights Act of 1975, enacted after *Alyeska*, whose text was almost verbatim the same as that of the 1976 Act at issue here, and whose legislative history (quoted in *Torres*, 538 F.2d at 12-13 n.2) was virtually identical to that of the 1976 Act. The court in *Torres* concluded that "the statute and its legislative history make it quite plain that the Congress rejected any such limitation" (*id.* at 12). That the House Report accompanying the *1976 Act* cited this decision provides unusually precise evidence of legislative intent.

This Court recognized that the 1976 Act authorized fee awards to attorneys employed by non-profit organizations in *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54, 70-71 (1980). While this Court did not address the measure of fee awards in *Gaslight*, both of the court of appeals decisions cited therein held that the amount of fees was not to be reduced in the case of non-profit attorneys, *Reynolds* v. *Coomey*, 567 F.2d 1166 (1st Cir. 1978); *Torres* v. *Sachs*, *supra*. See also, *Washington* v. *Seattle School Dist. No. 1*, —— U.S. ——, 102 S. Ct. 3187, 3204 n.31 (1982) (citing *Dennis* v. *Chang*, 611 F.2d 1302 (9th Cir. 1980)).

market value for his services as would be due any other lawyer of his skill and experience.[20]

In the face of these definitive legislative materials, petitioner and the Solicitor General are able only to lift the word "windfall" out of context from the congressional reports and to make the bald assertion that non-profit lawyers would receive a "windfall" if paid the market value of their services. But when the word "windfall" is seen in the context in which Congress used it, there can be no doubt that the definition of the word asserted by petitioner and the Solicitor General is not the definition intended by Congress.

The House Report, after reciting that the *Johnson* standards were those to be used in fee-setting under the Act, stated:

> *The application of these standards will insure that reasonable fees are awarded* to attract competent counsel involving civil and constitutional rights, *while avoiding windfalls to attorneys.* [H. Rep. No. 94-1558, *supra*, at 9 (emphasis added). See also S. Rep. No. 94-1011, *supra*, at 6].

Thus, the words of the report define the term "windfall." A "windfall" is a fee that exceeds the "reasonable fee" arrived at by application of the *Johnson* criteria. Put

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[20] Petitioner and the Solicitor General argue, for example, that salaried attorneys for non-profit organizations should never be given a contingency adjustment because such an adjustment is not necessary to induce such attorneys into the market. Pet. Br. at 33-34; Br. for United States at 21-22. But this argument, contrary to Congress' intent, would read one of the *Johnson* factors out of the law for that class of lawyers. Moreover, the argument proves too much. The availability of any fee at all is often unnecessary to induce such an organization, or an altruistic private firm, to undertake a case. The argument, therefore, cannot be limited to the risk adjustment, but would extend to the entire fee. As we have shown, Congress made a different judgment. The criteria established by Congress are market value criteria; Congress gave not the slightest indication that lawyers who somehow evidenced a willingness to work for less should therefore receive less.

another way, a fee arrived at by application of the *Johnson* criteria is by defintion a "reasonable fee" and therefore not a "windfall." Such an interpretation is buttressed by the fact that the *Johnson* criteria are derived from the ABA standards. The latter standards were developed to enable lawyers to determine what is a "reasonable" fee; and the ABA Rule declared that an "excessive" fee was one that exceeded the amount derived by application of those standards. *King* v. *Greenblatt*, *supra*, 560 F.2d at 1027 n.6.

Moreover, even apart from the clear evidence of congressional intent, the concept of "windfall" proposed by petitioner and the Solicitor General is one that would not likely appeal to any Congress. By their concept, a lawyer's fee becomes a function not of his skill and experience but of the type of practice he chose to follow or of the type of clients he chose to represent in cases other than the one before the court. For example, suppose a given lawyer who is highly skilled and experienced chooses at one point in his career between three separate types of career opportunities then available to him. The first is at a for-profit corporate law firm; the second is at a for-profit firm that represents indigent clients at reduced rates; and the third is at a non-profit organization that would employ him on a salaried basis. According to petitioner and the Solicitor General, should that lawyer subsequently represent the prevailing party in a case covered by § 1988 his fee award would depend on which job he had chosen: as a corporate lawyer, he would be entitled to greater fees in handling the civil rights case than he would if he chose either of the other two career paths. Though the market value of his services in the civil rights case, based on skill and experience, would be the same no matter which career he chose, it would, according to petitioner and the Solicitor General, be a "windfall" to award him that market value if he

chose as his general career to be other than a corporate lawyer.[21]

It is simply not a windfall to award a lawyer a fee determined by the market value of his services. And, as we have shown, Congress intended market value to be the controlling standard in setting fees in all cases under § 1988.[22]

4. While all fee applicants under § 1988 are entitled to a fee determined by market based standards, that does not mean that all lawyers are entitled to the same fee, much less that all lawyers are entitled to the highest level of fees charged in the community. Just as the market sets different fees for different lawyers according to their skill and experience, so should a court in setting the lodestar rate under § 1988. The *Johnson* factors require that the fee be calibrated to the "experience, reputation and ability" of the attorney applying for the fee. See *supra*, p. 10. Under the *Copeland* approach, that

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[21] A variant of the same hypothetical is the following: three lawyers of precisely equal skill and experience, one from each of the three careers described in text, jointly represent successful plaintiffs in a complex civil rights action, and in so doing perform work of precisely the same nature and quality. Under the view of § 1988 advocated by petitioner and the Solicitor General, each lawyer would receive a different fee depending on his occupation apart from the case before the court.

[22] That Congress has not in subsequent years changed its view on this subject is reflected in the report accompanying the Equal Access To Justice Act of 1980:

> The fact that attorneys may be providing services at salaries or hourly rates below the standard commercial rates which attorneys might normally receive for services rendered is not relevant to the computation of compensation under the Act. In short, the award of fees is to be determined according to general professional standards. [H. Rep. No. 96-1418, 96th Cong. 2nd Sess. (1980) at 15. Accord: S. Rep. No. 96-253, 96th Cong. 1st Sess. (1979) at 16-17.]

The Equal Access to Justice Act of 1980 is also discussed *supra*, n.8.

calibration is accomplished by first establishing the experience, reputation and ability of the fee applicant and then determining the prevailing hourly rate in the community for lawyers in the community of similar experience, reputation and ability.

The burden is on the fee applicant to establish both the level of his experience, reputation and ability and the prevailing community rate for lawyers with comparable qualities. In cases following *Copeland*, the District of Columbia Circuit has delineated with precision the types of evidence that may be used to meet those burdens. See *National Association of Concerned Veterans* v. *Secretary of Defense*, 675 F.2d 1319 (D.C. Cir. 1982); *Donnell* v. *United States*, 682 F.2d 240 (D.C. Cir. 1982), *cert. denied*, 103 S.Ct. 1190 (1983). Those cases also state with clarity the factual findings that courts must make to justify each element of a fee award. *Copeland* and its progeny provide the proper methodology for carrying out § 1988's mandate to provide attorneys in civil rights cases compensation at the market value of their services.

CONCLUSION

Congress' intent with respect to the issues presented in this case is unmistakable, and is correctly reflected in *Copeland* v. *Marshall*, 641 F.2d 880 (D.C. Cir. 1980) (*en banc*). This Court should endorse the approach adopted in that opinion for implementing that congressional intent.

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No. 81-1374

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BARBARA BLUM,

Petitioner,

v.

ELLEN STENSON,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NEW YORK STATE BAR ASSOCIATION AND THE COMMITTEE ON LEGAL ASSISTANCE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS *AMICI CURIAE*

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 81-1374

BARBARA BLUM,

Petitioner,

v.

ELLEN STENSON, Respondent.

BRIEF FOR THE NEW YORK STATE BAR ASSOCIATION AND THE COMMITTEE ON LEGAL ASSISTANCE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS AMICI CURIAE

INTEREST OF AMICI*

This brief is filed on behalf of the New York State Bar Association and the Committee on Legal Assistance of the Association of the Bar of the City of New York. The New York State Bar Association is a

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*/ Letters of consent by both parties to the filing of this brief have been lodged with the clerk of court.

voluntary association with a current membership of approximately 31,000 attorneys. It is the largest voluntary state bar association in the United States. The Association of the Bar of the City of New York is a voluntary association with a current membership of approximately 13,000 attorneys. It is the largest municipal bar association in the United States. The Committee on Legal Assistance is concerned with all issues relating to legal representation and access to the courts by all citizens whatever their means.

The issue before the Court concerns the standards which should govern the award of attorneys' fees to prevailing parties in civil rights and other public interest litigation, pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, 42 U.S.C. § 1988 (the "Act"), and related statutes. Amici are vitally interested in the subject from two different but

complementary viewpoints.

First, both amici long have been actively concerned as a matter of public policy with insuring the availability of counsel for individuals and groups seeking vindication of their civil rights, but lacking sufficient funds to retain counsel to represent them. Most of these plaintiffs are dependent upon the ability of legal services offices and public interest law firms to represent them without charge. The continued availability of this representation will be seriously affected by the standards for fee awards set by this Court, for such fee awards have become an increasingly important source of the funding for these legal services programs and public interest law firms.

Second, among amici's memberships are some private practitioners who have been able and willing to take civil rights and related cases because of the availability of

statutory fee awards. The private bar's willingness to handle these cases is contingent upon the fee awards being equivalent to those available in other types of litigation where the attorney's compensation is based upon the market rate.

In both of these respects, amici are greatly concerned that any use of a "cost plus" formula for determining attorneys' fees, contrary to the long-established "market rate" approach, will have a severely negative impact on the availability of counsel in civil rights matters. Any formulation which either reduces the level of fees below the market rate attorneys may receive in other types of litigation, or which complicates and expands the proceedings in which attorneys' fees are sought, will discourage the involvement of the private bar in civil rights cases, contrary to the intent of Congress when it passed the Act. At the same time, such a formulation

also would diminish the financial resources of legal services offices and public interest law firms, and thereby limit their ability to play a central role in the enforcement of civil rights laws.

SUMMARY OF ARGUMENT

I.

The legislative history of the Civil Rights Attorney's Fees Awards Act of 1976 (42 U.S.C. § 1988) clearly establishes that fees are to be based on hourly rates that attorneys of equivalent seniority and expertise can command in the open market. Moreover, Congress intended that fees to attorneys working for non-profit public interest organizations be determined on the same basis as are those for attorneys in the private bar.

Fees must be calculated on a market rate approach to attract attorneys to civil rights litigation. The "cost plus" approach

would result in attorneys rejecting such cases, because its purpose is to reduce fee awards, and its effect would be greatly to complicate and prolong counsel fee proceedings.

II.

Adjustments to lodestar fee amounts are required to produce adequate fees. In addition to compensating for the risk in taking on contingency cases, multipliers also adjust for delays in payment, results obtained, and quality of representation. The use of multipliers is fully supported by the legislative history of the Act. They have long been used as a matter of course in antitrust and securities litigation in the federal courts.

ARGUMENT

I.

THE MARKET RATE APPROACH IS AN EFFECTIVE AND PROPER METHOD FOR CALCULATING ATTORNEYS' FEES IN CIVIL RIGHTS CASES.

In the present case attorneys' fees were awarded to the Legal Aid Society of New York, a privately and publicly funded public interest law organization. However, the briefs of both the petitioner and amicus United States[1/] urge the Court to adopt generally the "cost plus" formula for calculating attorneys' fees and to reject the market rate approach, which has been adopted by every court of appeals[2/] and which was

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1/ Brief of Petitioner, pp. 12,n.**; 21-29; Brief for the United States, Section II (1).

2/ Beazer v. New York City Transit Authority, 558 F.2d 97 (2d Cir. 1977), rev'd on other grounds, 440 U.S. 568 (1979); Torres v. Sachs, 538 F.2d 10, 13 (2d Cir. 1976); Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980) (en banc); Palmigiano v. Garrahy, 616 F.2d 598 (1st Cir.), cert. denied, 449 U.S. 839 (1980); Rodriguez v. Taylor, 569 F.2d 1231 (3rd Cir. 1977), cert. denied, 436 U.S. 913 (1978); Walston v. School Bd. of City of Suffolk, 566 F.2d 1201 (4th Cir. 1977);

implicitly endorsed by this Court in Hensley v. Eckerhart, ___U.S. ___, 76 L.Ed.2d 40 (1983).

Amici support the position of respondent and other amici that the standard for calculation of attorneys' fees should be the same whether counsel are from the private bar or are employed by public interest organizations. The legislative history of the Act shows that the specific cases endorsed by

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2/ continued

James v. Stockham Valves & Fittings Co., 559 F.2d 310, 359 n. 64 (5th Cir. 1977), cert. denied, 434 U.S. 1034 (1978); Singer v. Mahoning County Board of Mental Retardation, 519 F.2d 748 (6th Cir. 1975); Hairston v. R & R Apartments, 510 F.2d 1090, 1093 n. 3 (7th Cir. 1975); Allen v. Amalgamated Transit Union Local 788, 554 F.2d 876, 884 (8th Cir.), cert. denied, 434 U.S. 891 (1977); Fountila v. Carter, 571 F.2d 487, 496 (9th Cir. 1978); Taylor v. Safeway Stores, Inc., 524 F.2d 263, 268 & n. 2 (10th Cir. 1975). But see New York State Ass'n for Retarded Children, Inc. v. Carey, 711 F.2d 1136 (2nd Cir. 1983) (version of "cost plus" method applied to public interest legal organization).

Congress as precedential guides for the award of fees under the Act involved both private attorneys and attorneys from various civil rights organizations.[3/] Moreover, Congress endorsed decisions explicitly holding that there should be no difference in the calculation of fees based on the source of

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3/ The Senate report specified the standards it intended to adopt:

> The appropriate standards, see Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974), are correctly applied in such cases as Stanford Daily v. Zurcher, 64 F.R.D. 680 (N.D. Cal. 1974); Davis v. County of Los Angeles, 8 E.P.D. ¶ 9444 (C.D. Cal. 1974); and Swann v. Charlotte-Mecklenburg Board of Education, 66 F.R.D. 483 (W.D.N.C.1975). These cases have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys.

S. Rep., 94-1011 (94th Cong. 2d Sess.) at 6. Similarly, the House report first adopted the Johnson factors, H.R. Rep., 94-1558 (94th Cong. 2d Sess.) at 8, and noted that "a prevailing party is entitled to counsel fees even if represented by an organization," id. at n.16, citing Torres v. Sachs, 538 F.2d 10 (2d Cir. 1976) and Fairley v. Patterson, 493 F.2d 598 (5th Cir. 1974). The House report

the attorney.[4/] Further, the legislative history endorses the market rate approach through its approval of Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974), and cases that follow that decision.[5/]

In this brief we will discuss the

3/ continued

concluded that: "The application of these standards will insure that reasonable fees are awarded to attract competent counsel in cases involving civil and constitutional rights, while avoiding windfalls to attorneys." Id. at 9.

Two of the four cases cited by the Senate and three of the cases cited by the House awarded fees to non-profit, civil rights litigating organizations on the same basis as to private attorneys; the organizations were the NAACP Legal Defense and Educational Fund, Inc. (Johnson and Swann), the Puerto Rican Legal Defense and Education Fund (Torres), and the Lawyers' Committee for Equal Rights Under Law (Fairley).

4/ Torres v. Sachs, supra, and Fairley v. Patterson, supra, cited at H. Rep. supra at 8, n. 16.

5/ Clearly, Congress could not have endorsed "cost plus," since the method was first described in the panel decision in Copeland v. Marshall, 594 F.2d 244 (D.C. Cir. 1978) handed down two years after the 1976 Act.

practical and policy reasons why the market rate approach is far superior to the "cost plus" approach, with a particular focus on the private bar. Our argument is based on a simple proposition. Congress has recognized that, unless there are sufficient financial incentives, there will be insufficient private attorneys to aid in the enforcement of the civil rights statutes. In the long run, attorneys in private practice simply will not take on civil rights cases, if to do so means they will be paid at a rate significantly lower than their their standard billing rates applied to all other matters.

Therefore, fees should be awarded based on the market rate that a particular attorney (or comparable attorneys) may command, which ordinarily would be the billing rate for comparable litigation.[6/]

6/ See National Ass'n of Concerned Veterans v. Sec. of Defense, 675 F.2d 1319, 1325 (D.C. Cir. 1982).

In a large firm, or a firm that mainly represents defendants, such billing or market rates would not be difficult to determine. For firms engaged in plaintiffs' work, or which carry on a substantial civil rights or other contingent fee practice and which therefore may not bill at all or bill impecunious clients at a reduced rate, fees would be calculated by looking to the market rates commanded by attorneys of comparable experience and expertise for litigation of equivalent complexity.[7/] Moreover, those rates must be comparable, as Congress has mandated, to rates obtained in other complex federal litigation such as anti-trust, securities or bankruptcy.[8/]

The problem with the "cost plus" approach, as the Court of Appeals for the District of Columbia cogently pointed out in

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7/ Ibid.

8/ See S. Rep., supra, p. 6.

Copeland v. Marshall, 641 F.2d 880, 896-900 (D.C. Cir. 1980)(en banc), is that it greatly increases the complexity of attorneys' fees litigation without any benefit. Theoretically, a "cost plus" analysis should yield the market rate of the attorney, since that rate includes amounts for both costs and profit. But the apparent purpose of a "cost plus" is to arrive at hourly rates lower than the market rate, and such a result would be precisely what Congress did not want, viz., fees below those that an attorney may obtain in other types of litigation.[10/] To the extent "cost plus" simply results in the market rate, it accomplishes nothing; to the extent it results in a rate lower than the market it conflicts with the statutory purpose.

10/ It was clearly the contemplation of Judge Wilkey, the originator of the "cost plus" approach, that significantly lower fees would result from it. See Copeland v. Marshall, 594 F.2d 244, 252, 257 (D.C. Cir. 1978); Copeland v. Marshall, 641 F.2d at 908-09, 930 (dissent).

Further, the "cost plus" formulation as originally stated in the panel decision in Copeland contemplated that a court would decide, based on some unarticulated standard, what a "reasonable" profit margin would be.[11/] How a district judge was to make such a determination was never explained.[12/] If one believes in the efficacy of the free market process, it must be assumed that the rates an attorney can command include a profit which the market, by its natural operation, has determined to be reasonable. Attorneys seeking an unreasonable level of profit would price themselves out of the market, and would have to reduce their fees.

The impact of a cost-plus formula on both litigants and the courts would be highly adverse. Both petitioner and the

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11/ 594 F.2d 244 (D.C. Cir. 1978).

12/ See 594 F.2d at 251-52.

government (which, it must be remembered, are represented by attorneys not in private practice) make the assertion that there would be no problem in making a "cost plus" presentation or determination. This simply is not the case. To develop a "cost plus" analysis would require an intensive investigation into costs at the time legal services were rendered, as well as an inquiry into the allocation and justification for each cost, including whether certain types of costs were "reasonable." Then the court would have to determine, again by an unknown standard, what a "reasonable" profit margin would be.

The "cost plus" formula totally overlooks the complexity of modern law firm accounting and the different ways in which a firm may structure itself. As formulated in Copeland I, and as outlined by the petitioner and the United States in this case, "cost plus" presupposes a simple partnership arrangement where fees come in, office costs

and salaries to non-partner personnel are paid, and at the end of the year what is left over is divided among the members of the firm.

However, modern law firms take on many forms and are structured in a variety of ways. For example, many states permit firms to organize as professional corporations in which all personnel, including those who would be senior partners in a traditional firm, are on salary. Other firms, while still partnerships, permit draws that are essentially the same as salary. Thus, at the end of the year there is no "profit" to distribute. Some firms rent space, others buy space and amortize it over a period of time.

Is a court to decide that one type of cost is reasonable and another is not? Is it to decide that the salaries of those employed by a professional corporation are "reasonable" or that they are "unreasonable"

and the hourly rate is therefore too high? What if a firm uses some of its receipts to establish pension and education funds or other benefits for its employees/shareholders/ partners? Is a court to determine whether such expenditures are costs, compensation, or profits, or whether they are reasonable or unreasonable?

Indeed, in a private firm consisting of a single lawyer engaged primarily in public interest litigation, a court would be engaged in the even more unseemly job of deciding whether the standard of living of the attorney was "reasonable". In such a firm the "plus" part of cost-plus is the lawyer's annual income. How is a judge to decide whether $15,000, $30,000, or $50,000 per year is "reasonable"?

The need to match costs with the relevant time period is another complexity inherent in the cost-plus approach. The approach requires the identification of costs

which relate to the period during which the services for which a fee award is sought. However, most law firms keep their accounting books on a cash basis, rather than an accrual basis. Expenses are charged at the time they are paid, regardless of the period benefitted by the expense. Such items as retirement costs, mortgage payments, insurance premiums, and other major but intermitent expenses may appear as a charge against one year, but in fact relate, in whole or in part, to an earlier or later period. A cost-plus approach, therefore, would require the court to convert a firm's actual cash-basis expense records into a hypothetical accrual charge fairly keyed to the relevant service period. No doubt the court would be "aided," in making this difficult conversion, by conflicting expert accounting testimony, bolstered by voluminous exhibits and explicated by learned briefs.

Even the most basic separation of cost from profit would present a fertile ground for litigation. A major element of a law firm's expense is the compensation paid to its partners. But the partners' compensation for accounting purposes is treated as profit, not expense. How is it to be treated under the cost-plus formula? Should the treatment differ if the partner is a professional corporation, or receives a fixed salary, or a salary subject to a year-end bonus? There is no valid purpose to be served in addressing such complexities, as required by the cost-plus approach, when the market rate charged for lawyers of equivalent stature will not vary to reflect these compensation nuances.

Further, focusing on actual costs would introduce totally arbitrary or fortuitous differences between law firms, be they private or public interest. In the City of New York, for example, the rents currently

paid by firms for prime location office space vary widely -- from less than $20 a square foot to well over $50 a square foot -- depending principally on the age of the lease. In addition, firms willing to locate in less prime areas save substantial sums of money on their rent. Yet, the hourly rates typically charged by these firms for equivalent legal talent -- the market rate -- varies hardly at all.

We submit that the wide differences in actual rent costs -- or in any of the myriad other types of costs -- should not influence in the slightest the size of legal fees awarded in civil rights litigation. Surely, Congress did not intend that a law firm with a lower rent should be awarded lower legal fees, for doing precisely the same legal work as another firm paying a higher rent. It is the quality of a firm's legal work, and not the peculiarities of its lease or other cost factors, which

determine its fees in the market and which should determine its fees awarded in court.

Further, not only would firms have to restructure their accounting systems to satisfy their "cost plus" burden, they would also have to open up their books to opposing counsel. Comparisons with other firms would be necessary by both plaintiffs and defendants. This would require a general intrusion into the workings of law firms in the area. The very process would strike most lawyers as unprofessional, if not demeaning. The predictable result would be decisions by many firms to avoid such intrusions by simply not taking on civil rights cases. Again, such a result would be totally contrary to the congressional intent.

The possibility of firms avoiding these vexing problems simply by avoiding taking civil rights cases is not a hypothetical one. The Court in Copeland III, 641 F.2d at 897, was justifiably concerned with

just such a result. A number of major firms in Washington were considering ceasing their involvement in Title VII litigation against federal government agencies because of Copeland I. Present amici can speak to experiences of the federal courts in the metropolitan New York area. Both the Eastern and Southern Districts of New York have found it necessary to search out attorneys willing to take on civil rights and other cases that are filed pro se, precisely because of the shortage of attorneys in private practice who have taken on such cases.[13/] Difficulties in eliciting the interest of firms will be exacerbated if it turns out that, by taking

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13/ See, Rules Governing Procedures for Appointment of Attorneys in Pro Se Civil Actions, E.D. New York, May, 1982.

Other district courts have experienced difficulty in finding enough attorneys to represent civil rights plaintiffs. Early this year the Chief Judge of the Eastern District of Michigan issued a plea to attorneys to take on such cases. Memorandum of Chief Judge, E.D. Mich., To Members of the Bar (undated [1983]).

on representation in the public interest, firms will have to undergo searching examination of their internal accounting and financial affairs in order to receive fair compensation for their efforts.

The market rate approach, on the other hand, has provided for many years an easy and expeditious way by which reasonable rates can be determined. The lower courts have used market rate not only in civil rights cases; it also has been the established method of determining reasonable fees in antitrust and other litigation for more than a decade. Therefore, contrary to the petitioner's unfounded claims of vast confusion in the courts below (Brief of petitioner, p. 9), there exists a well established and consistent body of law on the subject.[14/] It is a body of law, we empha-

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14/ See Developments: Attorney Fee Awards In Antitrust Class Actions, 5 Class Action Reports 331, 332 (1978); Developments: Attorney Fee Awards In Securities Class Actions, 5 Class Action Reports 470 (1978).

size, which requires close scrutiny of all fee applications, authorizes only reasonable fee awards commensurate with the work performed and the results achieved, and avoids, as Congress specifically found, "windfalls to attorneys." H.R. Rep. 94-1558 (94th Cong. 2d Sess.) at 9.

A firm's own billing rates, the rates requested by other firms in comparable litigation, and a comparison with rates awarded by courts in similar cases, serve as easily obtainable and verifiable bench marks. For example, in a recent issue of The American Lawyer, data was published regarding the billing rates of 44 firms in five major bankruptcy cases.[15/] From time to time surveys of fees sought and awarded in federal cases are published.[16/] There are also

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15/ The American Lawyer, Sept. 1983, p. 10. Hourly rates ranged from $325 for senior partners to $45 for second year associates.

16/ See, e.g., Developments: Attorney Fee Awards in Antitrust and Securities Class Actions, 6 Class Action Report 82 (1980).

sources of information relating to attorneys' fees. Thus Altman and Weil, Inc., a firm specializing in law firm economics, publishes the Annual Survey of Law Firm Economics. The 1982 survey, for example, contains regional surveys of hourly rates charged by a total of 530 firms.

Once the general range of fees available in the market has been established, courts could use that information in many cases. "Cost plus," on the other hand, would require an individualized, case-by-case determination every time a fee application was filed, as the actual costs incurred will vary radically from firm to firm and case to case. Indeed, even in the same case involving the same lawyers, successive fee applications would require searching determinations, since the level of costs and the ratios of salaries to overhead may vary from year to year. The ultimate irony is that the

"cost plus" approach could result in defendants paying higher fees overall, since they must pay for the time plaintiffs expend litigating fee applications.[17/]

In summary, for the courts, adoption of the cost-plus formula would be a vexatious imposition. In attempting to determine, categorize and adjust cost factors, and in attempting to fix a "reasonable" profit, divorced from the judgment of the marketplace, the courts would be functioning more like utility rate commissions than judicial tribunals. Litigation over the prevailing party's fee award would threaten to take up more court and lawyer time than the litigation over which party should prevail on the merits. Such a result would be directly contrary to the theme sounded by both the majority and concurring opinions in Hensley v. Eckerhart, __U.S. __, 76 L.Ed.2d 40, 53, 64-65 (1983), that counsel

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17/ Copeland, III, supra at 896.

fee matters should be handled as expeditiously and with as little court time as possible.

II.

ADJUSTING THE LODESTAR IS APPROPRIATE IN CALCULATING A REASONABLE FEE

Again, for the reasons set out in the briefs of respondent and other amici, the legislative history fully supports the use of adjustments[18/] in calculating reasonable fees. Neither petitioner nor the government in its amicus brief explain the different aspects of such adjustments and the necessity for them in contingent litigation.

With regard to the risk of losing, a contingency adjustment is necessary because

18/ The term "bonus" is a perjorative misnomer, since it suggests that plaintiffs' attorneys are getting paid for nothing. In fact, the lodestar is being adjusted to ensure adequate compensation. Northcross v. Bd. of Ed. of Memphis, 611 F.2d 624, 638 (6th Cir. 1979).

the typical civil rights or other public interest plaintiff not only does not have the money to pay attorneys' fees, but also may not have funds to meet the costs of this complex and time consuming litigation. The resources of public interest organizations are limited, [19] and to the extent they cannot fund litigation the often substantial costs may have initially to be incurred by the law firm representing the plaintiff.[20] If the case is lost that money is not easily recoverable, and the firm therefore not only takes the risk of not receiving any fees, but also of being substantially out of pocket. A contingency adjustment, or the chance of obtaining one, serves as a further necessary incentive to attract practitioners to this type of litigation.

19/ See Vulcan Soc. of Westchester Cty. v. Fire Dept., 533 F. Supp. at 1054, 1065-66 (S.D.N.Y. 1982).

20/ See Rule 6, Rules Governing Procedures for Appointment of Attorneys in Pro Se Civil Actions, E.D. New York.

Further, an adjustment does not simply address the question of contingency per se, i.e., the risk of losing. It also, as explained by the Court of Appeals for the District of Columbia Circuit in Copeland, is necessary to compensate for delay in payment, for results obtained, and for quality of representation. 641 F.2d at 892-94.

Basically, the setting of the "lodestar" fee based on a market rate establishes a fee which represents what comparable attorneys would obtain in the market place. It is an estimated rate reflective of the billing practices of average practitioners, i.e., firms that bill and get paid on a current basis regardless of the outcome of the litigation. Consequently, it does not provide adequate compensation for contingent fee plaintiffs' attorneys, for it does not take into account such matters as the loss in value of money because of inflation, the loss of the use of the money because of delay in

payment, the results obtained, the risk of losing, etc.

Again, the governing congressional intent is to award rates which are sufficient to attract practitioners who would otherwise spend their time in more lucrative litigation. If, for example, an attorney knows that he or she can receive $X an hour on a regular monthly basis doing defense work, he or she will be reluctant to take on a plaintiff's civil rights case at only $X an hour, since he will recover no money if the case is lost, and, even in successful cases, payment may not be received until several years after an action has been commenced.

To offset these concerns the ultimate fee awarded must be adjusted to provide full compensation. This can be done either by adjusting the rates themselves or by awarding a standard lodestar rate and then adjusting the overall amount appropriately. For example, if the hourly rates

are based on current rates, the rates themselves will compensate for delay in payment, and there should not also be an upward adjustment to compensate for that same factor.[21] Similarly, either higher hourly rates than charged by attorneys who get paid win or lose,[22] or a contingency adjustment applied to a lodestar, must be utilized.

In short, it is clear that to carry out the Act's purpose of attracting the private bar, it is essential that appropriate adjustments be made in fees calculated on a standard hourly rate in order to provide adequate and full compensation to practitioners.

21/ Copeland III, supra at 892-93.

22/ See Jones v. Diamond, 636 F.2d 1364, 1382 (5th Cir. 1981) (en banc).

CONCLUSION

For the foregoing reasons, amici urge that the decision of the court below should be affirmed.

Respectfully submitted,

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Amicus Brief for the United States

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No. 81-1374

In the Supreme Court of the United States

OCTOBER TERM, 1983

BARBARA BLUM, PETITIONER

v.

ELLEN STENSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

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QUESTIONS PRESENTED

The United States will address the following questions:

1. Whether, and in what circumstances, the "reasonable attorney's fee" that may be awarded to the prevailing party under 42 U.S.C. (Supp. V) 1988 should include a "bonus" or "multiplier" in addition to an amount based upon the number of hours reasonably expended on the claim assessed at a reasonable hourly rate.

2. Whether an award of attorney's fees under 42 U.S.C. (Supp. V) 1988 for the benefit of a non-profit legal services organization should be calculated on the basis of prevailing market rates for services of retained counsel.

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In the Supreme Court of the United States

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BARBARA BLUM, PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

INTEREST OF THE UNITED STATES

This case presents important recurring questions concerning the determination of the amount of attorney's fees that may be awarded to a prevailing party under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. (Supp. V) 1988.[1] It is arguable that, pursuant to 28 U.S.C. (Supp. V) 2412(b), as added by the Equal Access to Justice Act, attorney's fees under the Civil Rights Attorney's Fees Awards Act may, in certain circumstances, be awarded against federal officials. Accordingly, the United States has a substantial interest in ensuring that fee awards are not excessive or contrary to Congress' intent. On the other hand, because private enforcement of the civil rights laws provides an important supplement to federal enforcement, the United States is vitally concerned that "fully compensatory fee[s]" (*Hensley* v. *Eckerhart*, No. 81-1244 (May 16, 1983), slip op. 11) be awarded in appropriate cases. The

[1] We will omit "Supp. V" in subsequent references to this section.

government's interest in striking this balance is not limited to cases arising under 42 U.S.C. 1988, because the Court's decision undoubtedly will affect the computation of attorney's fees under other fee-shifting statutes as well. See *Hensley* v. *Eckerhart*, *supra*, slip op. 8 n.7.

STATUTE INVOLVED

42 U.S.C. 1988 provides in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. 1681 et seq.], or title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT

1. Respondent, a former recipient of assistance under the Medicaid program, 42 U.S.C. (& Supp. V) 1396 *et seq.*, brought this action pursuant to 42 U.S.C. 1983 in the United States District Court for the Southern District of New York in 1978. She alleged that procedures employed by the State of New York to terminate Medicaid benefits for certain persons were contrary to federal statutes and regulations and violated her constitutional rights. The district court ultimately certified a class of persons affected by the disputed procedures, dismissed respondent's claim against federal and New York City officials who had been joined as defendants, and entered judgment granting declaratory and injunctive relief against petitioner, the New York State Commissioner of Social Services. *Stenson* v. *Blum*, 476 F. Supp. 1331 (S.D.N.Y. 1979), aff'd, 628 F.2d 1345 (2d Cir.), cert. denied, 449 U.S. 885 (1980).

2. Respondent's counsel, the New York Legal Aid Society, sought an award of attorney's fees pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988.[2] The Legal Aid Society requested a basic award of

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[2] We follow the usage of the district court in stating that the fee application was made on behalf of respondent's counsel. Pursuant to 42 U.S.C. 1988, the award is actually made to the prevailing party. We

$79,312 for 769-3/4 hours devoted to the case by three of its staff attorneys. The hourly rates imputed to those attorneys were $95 per hour for a 1977 law school graduate, $100 per hour for a 1976 graduate, and $105 per hour for a 1975 graduate, the most senior member of the litigation team. In addition, the Legal Aid Society sought a bonus award equal to 50% of the basic amount. The total fee request was thus $118,968 (Pet. App. 6a, 12a).

The district court awarded the entire amount sought by respondent's counsel (Pet. App. 4a-13a). The court approved the hourly rates requested for the time spent by the three Legal Aid Society attorneys, stating that the rates were "consonant with fee awards in cases of similar complexity and difficulty" (*id.* at 8a). The court also ruled that the out-of-court work performed by the Legal Aid Society attorneys was properly divided so as to avoid duplication of effort and that their team appearances in court were not unjustified (*id.* at 11a). In addition, the district court granted the Legal Aid Society's request for a bonus of 50% over and above the basic award for time expended (*id.* at 12a; citations omitted):

> On the facts of this case, I deem an upward adjustment of the lodestar amount appropriate. The quality of representation was high. The litigation was complex. The issues presented were novel, and the undertaking therefore risky. Finally, the outcome was of great benefit to a large class of needy people. All of these factors render an incentive award appropriate.
>
> Plaintiffs request a bonus of 50% of the lodestar amount. Particularly in view of the complexity of the litigation and the benefit to the class, I find such an award appropriate.

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assume that respondent has agreed to pay any award to her counsel and that respondent is not otherwise obligated to the Legal Aid Society for the cost of her representation.

Accordingly, the court entered a judgment for attorney's fees against petitioner in the full amount of $118,968.[3]

3. The court of appeals affirmed in a brief unpublished memorandum (Pet. App. 1a-2a). The court of appeals held that the district court's review of time records submitted by respondent's counsel was sufficient to support the determination that the hours billed were neither duplicative nor unreasonable and that the hourly rates were fixed pursuant to the proper standard. In addition, the court of appeals upheld the bonus award, echoing the justifications given by the district court.

SUMMARY OF ARGUMENT

I

A. The Civil Rights Attorney's Fees Awards Act of 1976 was enacted in response to *Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U.S. 240 (1975). There, the Court declined to fashion a "private attorney general" exception to the "American Rule" under which parties to civil litigation generally bear their own attorney's fees. Accordingly, the measure of the fee to be awarded in cases arising under the Act must be determined by the statutory standard of "reasonableness," viewed in light of the congressional intent.

Congress described "a reasonable attorney's fee" as one that is "adequate to attract competent counsel, but * * * do[es] not produce windfalls to attorneys." S. Rep. No. 94-1011, 94th Cong., 2d Sess. 6 (1976). Compensation based upon a reasonable number of hours assessed at a reasonable hourly rate ordinarily should meet the statutory standard. The award of a bonus or multiplier over and above this amount is accordingly suspect; such an enhanced award exceeds the sum necessary to attract competent counsel and thus represents a windfall to attorneys.

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[3] The district court also rejected petitioner's contentions that the fee award should be reduced on the ground that respondent did not prevail on all issues or in all procedural phases of the litigation (Pet. App. 9a-11a). This contention was not pressed on appeal and is not before this Court.

The Court's recent decision in *Hensley* v. *Eckerhart*, No. 81-1244 (May 16, 1983), reinforces this conclusion. The Court observed that a "fully compensatory fee" based on hours reasonably expended generally provides complete compensation even when counsel obtains "excellent results" for his client. Slip op. 11. Moreover, the Court precluded compensation for unsuccessful claims unrelated to those upon which the party has prevailed and directed that the fee be adjusted to exclude compensation for hours that are disproportionate to the results achieved. Use of bonuses and multipliers to enhance fees in circumstances that are anything short of extraordinary would effectively negate Congress' judgment that only prevailing parties are to recover fees.

B. Under these principles the bonus award in this case should be set aside. The amount of the bonus alone—50%—far exceeds the amount that Congress could have expected in litigation of this type. More important, the district court relied upon inappropriate considerations in bestowing the bonus.

First, the novelty and complexity of the issues should have been fully reflected in the hours reasonably devoted to the litigation, and perhaps in the hourly rate as well. The high quality of the representation likewise should have been taken into account in the hourly rate awarded. Moreover, the extent of the benefit conferred on respondent's class was a function of the cause of action pleaded, the relief requested, and the skill with which litigating objectives were pursued—all factors that should have been measured by the determination of hours reasonably expended and the appropriate hourly rate of compensation.

The final basis for the bonus was the risk that respondent might not have succeeded in this action and that her counsel accordingly would have gone uncompensated. But multiplication of a compensatory award to adjust for the risk of non-success is inconsistent with Congress' judgment that only prevailing parties should be awarded fees and then only to the extent of their success. The effect of a contingency bonus is to underwrite the unsuccessful litigation activities undertaken by counsel and, in conflict with the deci-

sion in *Hensley*, to compensate counsel, albeit indirectly, for services rendered "whenever it was reasonable for a plaintiff to bring a lawsuit." Slip op. 11. This approach changes the statutory provision for recovery of attorney's fees by prevailing parties into a supplemental funding mechanism for non-fee-generating legal services.

A contingency bonus is especially inappropriate when awarded to a non-profit legal services organization that does not accept fee-generating cases. Such an organization experiences no special risk of non-payment when it undertakes litigation of uncertain prospects. Thus, a bonus should not be needed to induce counsel to assume the risk of nonpayment in such cases.

II

The high hourly rates awarded to respondent's counsel in this case do not conform to the statutory standard. The rates reflect market levels of compensation (including profit) for profit-making attorneys and incorporate overhead and salary costs that are likely to exceed greatly those incurred by non-profit legal services organizations. Thus, these rates confer an unjustified windfall or subsidy upon legal services organizations. Moreover, because legal services organizations exist to provide legal services in cases such as those covered by a fee-shifting statute, the market rate does not provide a reliable measure of the fee needed to attract these organizations to undertake such representation.

ARGUMENT

I. A BONUS AWARD OF ATTORNEY'S FEES, IN ADDITION TO COMPENSATION AT A REASONABLE RATE FOR HOURS REASONABLY EXPENDED BY COUNSEL, IS ORDINARILY IMPROPER

The court of appeals upheld the district court's augmentation—by a bonus of 50%—of a fee award that was based upon hours reasonably expended at a hourly rate determined to be reasonable. This multiplier was based upon (1) novelty and complexity of the issues, (2) quality of the representation, (3) quantity of the benefit conferred and the size of the beneficiary class, and (4) uncertainty of the outcome (Pet. App. 12a). We submit that, on the record of this

case, the award of such a bonus conflicts with Congress' intent in authorizing an award of attorney's fees under 42 U.S.C. 1988.

A. A Bonus Is Appropriate Only in Exceptional Circumstances

1. The backdrop for analysis of attorney's fee issues is *Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U.S. 240 (1975). There, the Court reaffirmed the continuing vitality of the "American Rule," holding that, absent a recognized common law exception or an Act of Congress directing otherwise, each party to civil litigation must bear its own legal fees. The Court thus rejected the "private attorney general" doctrine that had been advanced by some lower courts as a basis for awarding attorney's fees to prevailing plaintiffs in litigation deemed to further the public interest.

In response to the Court's invitation in *Alyeska* to make explicit provision for an award of attorney's fees in appropriate cases (421 U.S. at 263-264, 271), Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988. That statute grants the courts discretionary authority to award "a reasonable attorney's fee as part of the costs" to any prevailing party other than the United States in civil rights litigation arising under specified statutes, including 42 U.S.C. 1983.

Because Congress enacted the fee award provision as a result of the decision in *Alyeska*, the legislative history of 42 U.S.C. 1988 is focused primarily upon the availability vel non of attorney's fees, rather than the measure of those fees. See S. Rep. No. 94-1011, 94th Cong., 2d Sess. 1-5 (1976); H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 1-8 (1976); *Awarding of Attorneys' Fees: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. (1975) (*passim*) (hereinafter "*Awarding of Attorney's Fees*"). Nevertheless, the Senate and House reports clearly identify the touchstone for determining the amount of a "reasonable" award of attorney's fees: "fees [should be] adequate to attract competent counsel but [should] not produce windfalls for attorneys." S. Rep. No. 94-1011, *supra*, at 6. See also H.R. Rep. No. 94-1558,

supra, at 9 (fees awarded should be sufficient "to attract competent counsel in cases involving civil and constitutional rights, while avoiding windfalls to attorneys"). Congress thus directed the courts to ensure that fees are sufficiently compensatory that civil rights plaintiffs will be able to obtain representation, without being excessively generous.

An award of attorney's fees computed by applying a reasonable hourly rate to the number of hours reasonably expended upon a successful claim should, by definition, be sufficient to attract competent counsel. Accordingly, absent exceptional circumstances, further enhancement of such an award—particularly enhancement by an arbitrary, large multiplier such as the district court chose in this case—suggests that a windfall is being provided to the prevailing party's counsel.

2. a. *Hensley* v. *Eckerhart*, No. 81-1244 (May 16, 1983), decided after the court of appeals' summary affirmance in the instant case, points in the same direction. The Court observed that the "most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation, multiplied by a reasonable hourly rate." Slip op. 9. The Court emphasized that under 42 U.S.C. 1988—and other similar statutes authorizing an award of attorney's fees to a prevailing party (see slip op. 8 n.7)—no award is due for attorneys' time devoted to an unsuccessful claim not related to the one on which the party has prevailed, even though both are raised in a single lawsuit (slip op. 10; footnote omitted):

> The congressional intent to limit awards to prevailing parties requires that these unrelated claims be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claim.

Moreover, even when the various claims pursued by a prevailing party are intertwined, the fee award must be reduced if the hours expended are not justified by the results actually achieved, because "Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill." *Id.* at 11. On the other hand,

"[w]here a plaintiff has obtained *excellent* results, his attorney should recover a fully compensatory fee[,]" and "in some cases of *exceptional* success an enhanced award *may* be justified." *Ibid.* (emphasis added).

The Court thus made clear in *Hensley* that the award of a fee embracing compensation for all hours reasonably expended at a reasonable hourly rate—"a fully compensatory fee"—is complete compensation for legal services rendered even in litigation in which the plaintiff has as a practical matter wholly prevailed in its objectives. Enhancement of this "fully compensatory fee" is presumptively unnecessary and may be warranted only in the event of truly extraordinary achievements through litigation. This suggests that it will be a rare case indeed that warrants any enhancement of the basic compensatory fee award. And even in such exceptional cases the amount of any bonus should be relatively slight. The Court recognized in *Hensley* (slip. op. 10-11) that any deviation from the success criterion in computing the amount of any attorney's fee would effect a fundamental departure from the congressional mandate and would risk converting 42 U.S.C. 1988 into a subsidy mechanism for all nonfrivolous civil rights litigation.

b. To be sure, the Court also indicated in *Hensley* (slip op. 9 n.9) that, in adjusting the amount of a fee award, the district courts might consider, in addition to the "results obtained," the other factors discussed by the Fifth Circuit in *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (1974).[4] In *Johnson* the court reviewed numerous factors, derived from the provisions of the American Bar Association's Code of Professional Responsibility, that govern determination of a permissible fee for retained counsel. The considerations discussed were grouped under 12 headings:

> (1) The time and labor required; (2) The novelty and difficulty of the questions; (3) The skill requisite to perform the legal service properly; (4) The preclusion

[4] The House and Senate Reports on the Civil Rights Attorney's Fees Awards Act cite *Johnson* as listing the factors to be considered in fixing a fee award. H.R. Rep. No. 94-1558, *supra*, at 8; S. Rep. No. 94-1011, *supra*, at 6.

> of other employment by the attorney due to acceptance of the case; (5) The customary fee; (6) Whether the fee is fixed or contingent; (7) Time limitations imposed by the client or the circumstances; (8) The amount involved and the results obtained; (9) The experience, reputation, and ability of the attorneys; (10) The "undesirability" of the case; (11) The nature and length of the professional relationship with the client; (12) Awards in similar cases.

The *Johnson* court did not suggest, however, that any of these factors should serve as a bonus or multiplier mechanically applied to augment a basic award computed by reference to the number of hours reasonably expended and a reasonable hourly rate. Moreover, as the Court observed in *Hensley* (slip op. 9 n.9), many of the additional factors mentioned in *Johnson* are typically "subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate."

A review of the *Johnson* factors bears out the Court's warning against double counting. For example, time and labor required, time limitations imposed by the client, and the novelty and difficulty of the questions are all factors subsumed within the number of hours reasonably expended on a claim. Similarly, the skill of the lawyer, the preclusion of other employment, the customary fee, and the experience, reputation and ability of the attorney generally are taken into account by the hourly rate determination. See *Northcross* v. *Board of Education*, 611 F.2d 624, 642-643 (6th Cir.), cert. denied, 447 U.S. 911 (1980); *Ramos* v. *Lamm*, Nos. 82-1531 and 82-1544 (10th Cir. June 15, 1983), slip op. 23 n.10. Accordingly, any enhancement of a fee award by a bonus or multiplier must be carefully scrutinized to ensure that the award conforms to the standard announced by Congress and does not represent an impermissible windfall to a prevailing party's counsel.

3. The legislative history of the attorney's fees provisions of 42 U.S.C. 1988 further supports the view that any bonus component of a fee award should be modest in size. In addition to citing *Johnson* (see page 9 note 4, *supra*), the Senate Report cited three district court decisions said to "correctly appl[y]" the *Johnson* standards in fixing a fee

award. S. Rep. No. 94-1011, *supra*, at 6; see *Hensley* v. *Eckerhart*, *supra*, slip op. 5 & n.4. In *Davis* v. *County of Los Angeles*, 8 Empl. Prac. Dec. (CCH) ¶ 9444, at 5047 (C.D. Cal. 1974), the district court added a "Result Charge" of $7,193.32 to the basic award of $39,868.00 for "Attorney's Time" at the "normal hourly rates," commenting that counsel had "achieved excellent results for the plaintiffs and the represented class" and that "[t]he nature of the case made it difficult to litigate" (8 Empl. Prac. Dec. at 5048). In *Stanford Daily* v. *Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974), aff'd, 550 F.2d 464 (9th Cir. 1977), rev'd on other grounds, 436 U.S. 547 (1978), the district court ruled that "the contingent nature of compensation, the quality of the attorneys' work, and the results obtained by the litigation warrant[ed] increasing the base fees figure (hours worked times average billing rate)" of $37,500 by $10,000. 64 F.R.D. at 688.[5] And in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 66 F.R.D. 483 (W.D. N.C. 1975), the district court did not explicitly compute a fee award based upon hours reasonably expended, nor was a separate bonus or multiplier employed. Rather, the court simply reviewed nine factors, similar to those listed in *Johnson*, and *reduced* the fee award requested by the prevailing party by roughly 15%. The court stated that the amount requested "would be reasonable" but that it "would prefer to err on the conservative side in dealing with any fee question" rather than "contribute unnecessarily to the overpricing of litigation in this or any other court." 66 F.R.D. at 486.

It is, of course, perilous to attribute great weight to the particular circumstances of district court cases mentioned in passing in a legislative report. But it is significant that, in the three cases cited by the Senate Report, one lowered the fee award requested by counsel and the other two added bonuses of only 20% or 25%. Thus, in approving the results in *Swann*, *Davis* and *Stanford Daily*, the Senate

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[5] Although the district court did not explain how it had translated these factors into the stated dollar amount, it emphasized that the various *Johnson* factors overlap and that "recognition of their overlap [is needed to avoid] unnecessary inflation of the attorneys' fees award." 64 F.R.D. at 682.

Report conveyed Congress' desire that bonus awards of attorney's fees should not be automatic and that any bonus component should be modest in amount so as to prevent "windfalls to attorneys" (S. Rep. No. 94-1011, *supra*, at 6).

B. The Bonus Award In this Case Was Improper

1. The bonus award in this case is inconsistent with the foregoing principles. The amount ($39,656) and size (50%) of the bonus award is itself entirely at odds with Congress' expressed intention to avoid excessive payments to attorneys.[6] Whatever may be the justification for some adjustment of an award in a proper case, nothing in the district court's findings suggests that the presentation in this case was so extraordinary as to warrant payment of attorney's fees to respondent's counsel representing nearly 400 hours of time that was not in fact expended. In any event, the factors cited by the district court in bestowing the 50% bonus do not support that part of the fee award, because they either give double weight to factors already accounted for in the determination of the reasonable hourly rate and the hours reasonably expended, or are otherwise impermissible.

a. For instance, the novelty and complexity of the issues should be fully reflected in the amount of time expended. If the issues were genuinely complex or difficult the amount of hours reasonably devoted to the matter would increase. If, on the other hand, it could credibly be determined that, because of the special skill, experience, or insight of counsel, complex issues were digested, researched, and presented in less time than a competent advocate would be expected to take, that fact might properly be reflected in the determination of the reasonable hourly rate. Here, however, the court made no finding that the number of hours for which fees were allowed failed to reflect fully the burdens assumed by counsel, or that counsel possessed special ability that was not considered in the hourly rate as-

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[6] See, *e.g.*, *New York State Ass'n for Retarded Children, Inc.* v. *Carey*, No. 82-7531 (2d Cir. June 15, 1983), slip op. 4597 (reducing bonus award from 25% to 10% despite the "high quality of [counsel's] work and the inherent complexity of the litigation").

signed—a rate, it is worth repeating, that was 100% of the rate requested by respondent's counsel.

b. Nor do the district court's findings justify enhancement of the basic fee award to reflect the quality of respondent's counsel's performance. The district court did remark that "[t]he quality of representation was high" (Pet. App. 12a). But given the hourly rates awarded, averaging nearly $100 per hour for relatively junior attorneys, such high quality representation may not properly be deemed an exceptional factor that warrants augmentation of the award.

Assuming that quality of representation is reflected in the extent to which the prevailing party achieves its litigating objectives, a "fully compensatory fee" award is adequate even for excellent results; only "exceptional success" may justify an "enhanced award." *Hensley* v. *Eckerhart*, *supra*, slip op. 11. And assuming further that the skill of counsel determines whether his client either succeeds in some measure or fails entirely, in some class of cases, the skill that permits such success is amply rewarded by the fact that an award of counsel fees is based on the time expended on successful claims. In any event, upon no view of the law could "[a] quality adjustment [be] appropriate [unless] the representation is unusually good or bad, *taking into account the level of skill normally expected* of an attorney commanding the hourly rate used to compute" the basic fee award. *Copeland* v. *Marshall*, 641 F.2d 880, 893 (D.C. Cir. 1980) (en banc) (emphasis in original).[7] The district court did not find that respondent's counsel's special skill either made possible a victory that otherwise would not have been attainable or was responsible for a greater degree of success than merely competent counsel could have achieved. A fortiori, there was no finding that respondent's counsel's skill was not fully reflected in the rates at which their hours were compensated.

c. A third factor cited by the district court to support the substantial bonus award was the extent of the "benefit to

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[7] See A. Miller, *Attorneys' Fees In Class Actions* 374-377 (1980) (skill and experience should determine hourly rate and "quality adjustment" should only reflect unusual performance in particular case).

a large class of needy people" (Pet. App. 12a). Again, to the extent that this factor has any bearing upon the determination of a proper attorney's fee, it should be fully accounted for in the award of fees at a reasonable hourly rate for time reasonably devoted to the successful claim. The extent of the benefit conferred on the respondent and her class may be relevant in determining how many hours it was appropriate to expend upon the matter. See *Hensley* v. *Eckerhart*, *supra*, slip op. 11-12. This factor may also shed light upon the type of attorney resources it was appropriate to employ—and thus upon the hourly rate at which it is reasonable to compensate counsel. It does not follow, however, that the benefit conferred should be recognized a second time in the form of a multiplier.

The extent of the benefit conferred by litigation may fairly be regarded as the product of two factors: the nature and magnitude of the relief sought in the complaint and subsequent pleadings (including any class-wide relief) and the party's success in achieving his stated objectives. If a demand for elaborate or class-wide relief complicates the litigation, it should be fully reflected in the hours expended thereon. The skill of counsel in bringing litigation objectives to fruition is likewise already reflected in the basic award; if the degree of success is "exceptional" it may warrant some modest degree of "enhance[ment]" of the award, but no more. See *Hensley* v. *Eckerhart*, *supra*, slip op. 11.

Moreover, as this Court is aware, a party's success in litigation all too often is attributable neither to counsel's decisions in framing his objectives nor to the quality of the advocacy employed in achieving those objectives. There is no reason to provide counsel extra compensation in those circumstances. Such an unearned increment is precisely the kind of windfall that Congress forbade in prescribing the standard for attorney's compensation. See pages 7-8, *supra*. The benefit conferred on the prevailing party accordingly provides no basis for multiplication of a reasonable attorney's fee under the statutory standard.

Indeed, the legislative history of the Civil Rights Attorney's Fee Awards Act indicates that Congress intended to divorce the amount of attorney's fees from a district

court's often subjective assessment of the benefit conferred.[8] Congress directed that fees not be reduced because the rights involved are nonpecuniary in nature (S. Rep. No. 94-1011, *supra*, at 6) or because the award of money damages makes recovery of fees superfluous (H.R. Rep. No. 94-1588, *supra*, at 8-9). Plainly, Congress did not want the courts to attempt assigning a dollar value to nonmonetary relief for purposes of determining a commensurate fee award.[9] Thus, it is inappropriate to award attorney's fees on the basis of the benefit conferred, whether the case involves monetary or nonmonetary relief.

2. The final factor cited by the courts below in justifying the substantial bonus award was the uncertainty (at the outset) whether respondent would prevail in the litigation. Pet. App. 3a, 12a. Although this contingency factor is commonly mentioned as a basis for enhancement of a compensa-

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[8] The statutory basis for attorney's fees under Section 1988 differs in this respect from the "common fund doctrine," which constitutes a judge-made exception to the American Rule. Under the common fund doctrine, a court may permit a party that "preserv[es] or recover[s] a fund for the benefit of others in addition to himself, to recover his costs, including his attorneys' fees, from the fund or the property itself or directly from other parties enjoying the benefit." *Alyeska Pipeline Co.* v. *Wilderness Society*, *supra*, 421 U.S. at 257 (footnote omitted); see also *Boeing Co.* v. *Van Gemert*, 444 U.S. 472, 478 (1980); *Trustees* v. *Greenough*, 105 U.S. 527, 533 (1881).

Courts have considered the amount of the benefit in awarding fees under the common fund doctrine, although it is doubtful that the amount of the benefit is relevant to the calculation of a reasonable fee even in this context. See Berger, *Court Awarded Attorneys' Fees: What is "Reasonable?"*, 126 U. Pa. L. Rev. 281, 298-300, 316-318 (1977). It is notable that recent decisions awarding attorney's fees in class actions under Fed. R. Civ. P. 23 evince a trend away from basing fees on the amount of the benefit; the courts instead have looked increasingly to the product of a reasonable rate and the hours expended. See A. Miller, *Attorneys' Fees in Class Actions* 13-14, 60-61 (1980).

[9] Determining the fee award on the basis of the extent of the benefit is inherently arbitrary in many cases covered by Section 1988. There is no principled way to measure the dollar value of nonmonetary relief in civil rights cases, see Berger, *supra*, 126 U. Pa. L. Rev. at 316, and ad hoc evaluation of the magnitude of the benefit conferred and the commensurate fee provides no guidance to courts or litigants in subsequent cases.

tory fee award,[10] it is difficult to reconcile with the provisions of the Civil Rights Attorney's Fees Awards Act, especially when the plaintiff is represented by a non-profit legal services organization that does not forego fee-generating work in undertaking litigation covered by the Act.

a. The rationale for the use of a contingency multiplier has been stated by the United States Court of Appeals for the District of Columbia Circuit:

> An attorney contemplating representation of a Title VII plaintiff must recognize that no fee will be forthcoming unless the litigation is successful. An adjustment in the lodestar, therefore, may be appropriate to compensate for the risk that the lawsuit would be unsuccessful and that no fee at all would be obtained.

Copeland v. *Marshall*, *supra*, 641 F.2d at 892. The problem with this explanation is that awarding extra compensation for the risk of losing a case circumvents Congress' determination that fees should be awarded only to prevailing parties.

This Court recently underscored the strength of that policy in *Hensley* in ruling that no fee award should be made for claims upon which a party does not prevail, if unrelated to successful claims, and that, even when a party succeeds in some measure upon a claim or constellation of related claims, fees must be reduced if the results achieved do not warrant the expenditure of time involved. Slip op. 10-11. And in *Ruckelshaus* v. *Sierra Club*, No. 82-242 (July 1, 1983), the Court reaffirmed this strong presumption by holding that "a successful party need not pay its unsuccessful adversary's fees" absent "a clear showing that this result was intended." Slip op. 5. Yet, the effect of

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[10] See, *e.g.*, *Copeland* v. *Marshall*, *supra*, 641 F.2d at 892-893; *Lindy Bros. Builders, Inc.* v. *American Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 116-117 (3d Cir. 1976) (en banc). *Lindy Bros.* is one of the leading cases endorsing the use of contingency multipliers and bonuses generally. But it was decided under the common fund exception to the American Rule, not Section 1988 or any other fee-shifting statute. See *Lindy Bros. Builders, Inc.* v. *American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 165 (3d Cir. 1973). See page 15 note 8, *supra*.

compensating a party that prevails for the risk that he might not have done so is indirectly to compensate that party (or, more aptly, his counsel) for unsuccessful litigation.

For example, if the chance of success in a particular case in which a party actually prevails were adjudged (with hindsight) to have been 50% at the time the complaint was filed, a risk multiplier of two might be justified on the theory espoused in *Copeland*. Assuming the risk assessment were accurate, it could be expected that counsel would succeed in one out of every two similar cases filed. The effect of doubling counsel's fee recovery for prevailing in the first case is indistinguishable from paying for the time counsel devotes to its hypothetical unsuccessful twin. See Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, 90 Yale L. J. 473, 491-493 (1981).[11] If, as the Court stated in *Hensley* (slip op. 10; footnote omitted), "[t]he congressional intent to limit awards to prevailing parties requires that [claims] unrelated [to a successful claim] be treated as if they had been raised in separate lawsuits, and therefore [that] no fee may be awarded for services on the unsuccessful claim," it follows that the award made for legal services in connection with a successful claim must not cross-subsidize other unsuccessful litigation. Similarly, indirectly to compensate counsel for their unsuccessful litigation efforts cannot be reconciled with the Court's insistence that "Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit * * *." *Hensley* v. *Eckerhart*, *supra*, slip op. 11.

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[11] *Laffey* v. *Northwest Airlines, Inc.*, No. 2111-70 (D.D.C. July 29, 1983), offers a good illustration. In that case, the district court found that plaintiffs' counsel had reasonably expended approximately 11,100 hours pursuing a sex discrimination claim. Slip op. 33-34. This led to a "lodestar" attorney's fee of approximately $1.48 million. *Id.* at 81. The court then approved a "risk adjustment" of 100% after determining that plaintiff's chances of prevailing were approximately 50% when the case was filed. *Id.* at 55, 83. By doubling the attorney's fees to account for this contingency factor, the court compensated plaintiffs' counsel for the equivalent of more than *five years* of attorney's time spent on unsuccessful cases.

Congress was aware of the significant policy choice made in limiting fees to prevailing parties under the Civil Rights Attorney's Fees Awards Act. At the House Hearings covering the bill ultimately enacted (along with other proposed legislative responses to this Court's *Alyeska* decision), Representative Seiberling remarked:

> Mr. Chairman, since these hearings do concern circumstances under which it would be appropriate to make one side in a lawsuit pay for the legal expenses of the other side, some people may conclude that the hearings are intended to promote the special interests of lawyers. Perhaps that is so to the extent it promotes the interests of successful lawyers who make the right judgments or who handle a case properly so that they win.
>
> But it certainly is not calculated to promote the interests of lawyers who make the wrong judgment or who make an ineffective presentation or who are on the wrong side of a lawsuit * * *.

Awarding of Attorneys' Fees, supra, at 8. See also 122 Cong. Rec. 33314 (1976) (remarks of Sen. Kennedy) (lawyer's "fee is contingent not only upon his success, but also upon the discretion of the judge before whom he appears").

Similarly, a representative of the "public interest bar" emphasized that fees would be limited to compensation for litigation that actually succeeds, stressing that the act did not contemplate a system of underwriting civil rights litigation. Peter H. Schuck of the Consumers Union explained (*Awarding of Attorneys' Fees, supra*, at 166-167 (emphasis added)):

> [T]he award of fees in the kind of cases we are discussing is both efficient and equitable. It is efficient in a very real sense, because what it does is to award public interest litigation by targeting incentives to a particular service and vindicating a particular Federal law. *It does not subsidize public interest groups. It does not give them generalized support for activities, some of which Congress may support and some of which Congress may not. But, as I say, it targets it to a particular objective, upon which Congress has spoken.*

Mr. Schuck emphasized that the purpose of awarding fees to a prevailing party under the statute is to "reward[ ] a 'public interest law firm' directly for its role in vindicating the law *in a particular situation*" (*id.* at 158; emphasis added). Thus, Congress did not intend to relieve counsel of the risk of noncompensation for services rendered in connection with unsuccessful lawsuits. The routine use of contingency multipliers frustrates this feature of Section 1988 by establishing a disguised subsidy for the litigation programs of self-appointed guardians of the public interest.

We are not unaware that "[n]o one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success" (*Cherner* v. *Transitron Electronic Corp.*, 221 F. Supp. 55, 61 (D. Mass. 1963)). But the contingency multiplier designed to compensate for the risk of nonsuccess is typically, as in this case, a mechanical and rather arbitrary upward adjustment of an award that already has been determined to be fully compensatory.[12] It does not represent an attempt to determine the hourly rate of compensation that is reasonable in light of the contingency factor by an objective standard, such as practices in the market regarding fees for contingent representation. See Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, *supra*, 90 Yale L. J. at 491.[13]

Of course, to the extent it can be shown that the contingent nature of a fee actually affects the reasonable hourly rate, that factor should be incorporated into the determina-

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[12] District courts face nearly insurmountable difficulties in determining what the chance of success was at the outset of a lawsuit. Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, *supra*, 90 Yale L.J. at 485-488; Note, *Promoting the Vindication of Civil Rights Through the Attorneys' Fees Awards Act*, 80 Colum. L. Rev. 346, 375 (1980). See also page 14, *supra*. Thus, it is doubtful that this factor can help determine a "reasonable fee" with any degree of accuracy, objectivity, or consistency.

[13] As the District of Columbia Circuit acknowledged in *Copeland* v. *Marshall*, *supra*, 641 F.2d at 893: "Contingency adjustments of [the] sort [it prescribed] are entirely unrelated to the 'contingent fee' ar-

tion of the basic compensatory fee award. We note in this connection that some element of contingency allowance is built into market rates for attorney's services, which necessarily cover hours that cannot be billed for one reason or another directly to a client. See *Copeland* v. *Marshall*, *supra*, 641 F.2d at 917-919 (Wilkey, J., dissenting). Moreover, as the district court observed in *Stanford Daily* v. *Zurcher*, *supra*, 64 F.R.D. at 682, which was cited with approval in the Senate Report, "an increase in the attorneys' fees because the chances of success (and for fees) at the beginning of litigation appeared slight is implicitly if not explicitly an increase due to the high caliber of the attorneys' representation." As explained above (page 13), that quality factor should be fully and fairly reflected in the hourly rate applied to determine the compensatory fee award. But any *additional* enhancement of the fee award to reflect the risk of non-success is inconsistent with Congress' decision to limit fees to successful claims and to avoid windfalls to attorneys.[14]

Finally, a contingency factor based on the district court's assessment of the plaintiff's chances of success at the outset of the lawsuit has the perverse effect of punishing defendants who have a strong (but ultimately losing) case while

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[14] Congress' endorsement (see page 9 note 4, *supra*) of the factors discussed by the court of appeals in *Johnson* v. *Georgia Highway Express, Inc.*, *supra*, does not indicate support for the kind of contingency multiplier employed in this case. True, one of the headings listed in *Johnson* was "Whether the fee is fixed or contingent" (488 F.2d at 718). But the Fifth Circuit stated not that this consideration warrants *enhancement* of a compensatory fee by application of a multiplier, but only that this factor should be taken into account in determining the amount of a compensatory fee. Moreover, the court's discussion under this heading suggests that it did not contemplate contingency multipliers designed to compensate counsel for the risk of nonsuccess. Rather, the court simply indicated that "[t]he fee quoted to the client or the percentage of the recovery agreed to is helpful in demonstrating the attorney's fee expectations when he accepted the case." *Ibid.* The contingency factor also was mentioned in *Stanford Daily* v. *Zurcher*, *supra*, cited in the Senate Report (see page 11, *supra*), but this was simply one factor among several invoked in support of a relatively modest bonus. Other cases cited by the Senate Report with approval did not include a contingency multiplier.

rewarding plaintiffs who pursue claims that seem unlikely to succeed. See Leubsdorf, *supra*, 90 Yale L.J. at 488-491; Note, *supra*, 80 Colum. L. Rev. at 375. This tends to coerce defendants to settle non-meritorious claims for fear of large attorney's fees and to induce plaintiffs to litigate insubstantial cases in the hope of obtaining awards enhanced by a hefty bonus. Congress could not have intended to encourage this conduct in enacting Section 1988.

b. The status of respondent's counsel makes the contingency bonus awarded by the district court particularly inappropriate. Respondent was represented by the Legal Aid Society of New York, presumably without cost to herself or to the members of the class. Respondent's counsel's only hope for compensation, therefore, rested upon the statutory authority for award of a fee against petitioner. Ordinarily, when a lawyer engaged in private practice agrees to represent a client on such terms he may have to forego fee-generating employment. Some adjustment in the hourly rate of compensation to reflect the greater risk of nonpayment as compared to the private attorney's normal practice may be reasonable in such cases.[15] By contrast, in the case of a legal services organization that does not solicit fee-paying clients, there is no more financial risk in undertaking civil rights litigation than in other work. Therefore, a contingency multiplier cannot be justified on the ground that it is necessary to attract counsel to undertake litigation subject to Section 1988. As the Second Circuit recognized subsequent to the decision below:

> Although a component of a bonus for risk of failure may be appropriate in some cases to entice private firms to undertake difficult cases in which victory is uncertain, we believe that the promise of such rewards

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[15] The normal hourly rates charged by counsel engaged in private practice reflect the fact that the client is expected to pay the fee regardless of the outcome of the case. If recovery of fees depends on the client's success, it may be necessary to allow a slightly higher hourly rate to induce lawyers engaged in private practice to undertake cases covered by Section 1988. This assumes, of course, that absent the inducement to undertake civil rights litigation provided by Section 1988, the lawyer would have sufficient fee-generating work fully to occupy his time.

> is not needed to induce non-profit organizations like the Legal Aid Society and the Civil Liberties Union to take on such cases. These organizations exist to represent groups like the [plaintiff] class, with constitutional claims at the cutting edge of the law.

New York State Ass'n for Retarded Children, Inc. v. *Carey*, No. 82-7531 (June 15, 1983), slip op. 4598.[16]

II. THE DISTRICT COURT ERRED IN AWARDING FEES BASED ON HOURLY RATES UNRELATED TO THE COSTS OF A NON-PROFIT LEGAL SERVICES ORGANIZATION

Petitioner argued below that the hourly rates employed by respondent in computing her request for attorney's fees were exorbitant. The district court concluded, however, that the requested rates, ranging between $95 and $105 per hour, were not excessive, stating that the "rates requested here are consonant with fee awards in cases of similar complexity and difficulty" (Pet. App. 8a). The court gave no consideration to the fact that the legal services were provided by a non-profit organization that unquestionably incurs costs significantly lower than the rates awarded. In our view, this approach affords respondent's counsel an impermissible windfall.

1. As noted earlier in connection with the bonus issue, in enacting 42 U.S.C. 1988 Congress instructed the courts to award "fees [that] are adequate to attract competent counsel, but which do not produce windfalls to attorneys" (S. Rep. No. 94-1011, *supra*, at 6; see also H.R. Rep. No. 94-1558, *supra*, at 9). In the case of attorneys engaged in private practice, it may be reasonable to employ the prevailing market rate for legal services provided by retained counsel as a rough and ready measure of the fee that is necessary to induce lawyers to engage in the kinds of litigation covered by Section 1988. The market rate should reflect the opportunity cost to private counsel of accepting civil rights cases in lieu of pursuing other available engagements (see

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[16] Accord: *McManama* v. *Lukhard*, 464 F. Supp. 38, 43 (W.D. Va. 1978), aff'd, 616 F.2d 727 (4th Cir. 1980); *Cole* v. *Tuttle*, 462 F. Supp. 1016, 1019 (N.D. Miss. 1978); *McCormick* v. *Attala County Board of Education*, 424 F. Supp. 1382, 1388 (N.D. Miss. 1976).

page 21 note 15, *supra*). It thus serves as a convenient guide to the level of compensation needed to attract competent counsel, as well as the level of compensation that should be regarded as a windfall.

Private market hourly rates necessarily include three elements: compensation for the billing attorney, the attorney's share of overhead expenses, and some profit for the attorney's firm. Use of such rates for non-profit organizations necessarily overcompensates the organization, however, because non-profit organizations are, by definition, not profit seekers. As the Second Circuit recently observed, "the profit component is a questionable ingredient in a 'reasonable' fee for a non-profit law firm." *New York State Ass'n for Retarded Children, Inc.* v. *Carey*, *supra*, slip op. 4589. And as the Second Circuit also observed, "the two remaining components of a private firm's billing rate would often reflect much higher expenses than those incurred by a non-profit office." *Ibid.* An award to a non-profit organization of fees computed at the prevailing market rate thus results in grossly excessive compensation—a result "explicitly proscribed in the legislative history of section 1988." *Id.* at 4590.

Moreover, in the case of a non-profit organization created to provide the kind of legal services covered by a fee-shifting statute, the private market rate for legal services does not reflect accurately either the level of fees needed to attract competent counsel or the level that will constitute a windfall. Precisely because such organizations do not accept conventional fee-generating engagements, the market rate does not measure their opportunity costs. See page 22, *supra*. And because of the non-profit status of the organization, any amount by which the fee awarded exceeds the cost of delivering the service is impermissible. The purpose of the Civil Rights Attorney's Fees Awards Act, after all, is simply to ensure that "citizens * * * have the opportunity to recover *what it costs them* to vindicate [their] rights in court" (S. Rep. No. 94-1011, *supra*, at 2; emphasis added).

We do not suggest that a non-profit legal services organization is barred from receiving a reasonable attorney's fee.

See *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54, 70 n.9 (1980); cf. *Washington* v. *Seattle School District No. 1*, No. 81-9 (June 30, 1982), slip op. 30 n.31. But in such cases the statutory standard of reasonableness must be applied with an appreciation that the law "does not require things which are different in fact * * * to be treated * * * as though they were the same." *Tigner* v. *Texas*, 310 U.S. 141, 147 (1940). Legal services attorneys are as competent and qualified as attorneys in the private sector, and their work is plainly important; but the undeniable fact is that the costs of such organizations fall far below the fees of private attorneys, and it is the latter that determine the market rate. Accordingly, Section 1988 should be interpreted to mean that a legal services organization may fully recover its costs of undertaking the representation—that is, an award of attorney's fees should be based upon the average salary and overhead expenses of the organization, rather than market rates for legal services.[17]

Payment of fees at unrealistically high hourly rates is particularly indefensible to the extent that legal services organizations are supported by public funds.[18] To be sure, awarding fees to such organizations based on market rates will free public resources for other organization activities.[19]

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[17] See *Copeland* v. *Marshall*, *supra*, 641 F.2d at 923-930 (Wilkey, J., dissenting); *Glover* v. *Johnson*, 531 F. Supp. 1036 (E.D. Mich. 1982); *Page* v. *Preisser*, 468 F. Supp. 399 (S.D. Iowa 1979); *Alsager* v. *District Court*, 447 F. Supp. 572 (S.D. Iowa 1977); cf. *New York State Ass'n for Retarded Children, Inc.* v. *Carey*, *supra*, slip op. 4586-4594; see also Comment, *Calculation Of A Reasonable Award Of Attorneys' Fees Under The Attorneys' Fees Awards Act of 1976*, 13 J. Mar. L. Rev. 331, 363 (1980).

[18] The Legal Services Corporation Act imposes some restriction on its grantees' pursuit of fee-generating cases, including those covered by fee-shifting statutes. See 42 U.S.C. (Supp. V) 2996f(b)(1). This restriction, however, is subject to exceptions created by the Legal Services Corporation regulations, see 45 C.F.R. 1609.4 (1982), and, where applicable, applies only to the actual use of federal funds rather than the grantees' other activities.

[19] See, *e.g.*, *Hensley* v. *Eckerhart*, *supra*, slip op. 6 n.6 (Brennan, J., concurring in part and dissenting in part); *Copeland* v. *Marshall*, *supra*, 641 F.2d at 899.

But this device arrogates to the courts a decision that belongs to Congress and state legislatures. Assuming that additional funding of legal services organizations is desirable, it is not appropriate for courts to mandate such funding by awarding fees far in excess of the costs of counsel. This is especially true with respect to public defendants: in that situation, fees for non-profit organizations based on market rates essentially represent a public subsidy for legal services groups beyond that voted by the legislature.

2. Nothing in the legislative history of the Civil Rights Attorney's Fees Awards Act of 1976 sanctions the award of fees that produce a windfall for non-profit legal services organizations. We are aware that the Senate Report cited *Davis* v. *County of Los Angeles*, *supra*, as "correctly appl[ying]" the "appropriate standards" for determining the amount of a fee (see pages 10-11, *supra*), and that the court in *Davis* held that "[i]t * * * is not legally relevant" that counsel there were employed by a "privately funded non-profit public interest law firm." 8 Empl. Prac. Dec. at 5048-5049. But *Davis* did not focus upon the question whether fees should be awarded at market rates even where those rates substantially exceed the legal services organization's actual cost of services. Moreover, the Senate Report also cited *Swann* v. *Charlotte-Mecklenburg Board of Education*, *supra*, as applying the correct standard. In *Swann* the district court indicated (66 F.R.D. at 486) that the fee awarded to a non-profit firm representing the prevailing plaintiff was less than that charged by the defendant's private firm for similar services that were not even successful. See *New York State Ass'n for Retarded Children, Inc.* v. *Carey*, *supra*, slip op. 4587. The court in *Swann reduced* the plaintiff's fee request to avoid "contribut[ing] unnecessarily to the overpricing of litigation." 66 F.R.D. at 486. Accordingly, these cases do not provide a reliable guide to congressional intent on this issue.[20]

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[20] The House Report reflects Congress' judgment that persons represented by non-profit legal services organizations should not for that reason be denied *any* award of fees. H.R. Rep. No. 94-1558, *supra*, at 8 n.16. See *New York Gaslight Club, Inc.* v. *Carey*, *supra*, 447 U.S. at

Indeed, the House Hearings on the fee-shifting bills that led to enactment of the Civil Rights Attorney's Fees Awards Act contain several statements that would have given Congress reason to expect that the fees awarded under the Act generally would be less than prevailing market rates for commercial legal services. For instance, Representative Wiggins suggested that the "reasonable attorney's fee fixed should be reduced to accommodate the professional duty which the bar holds to a certain class of litigants." *Awarding of Attorney's Fees, supra*, at 76. A "public interest" lawyer who handled fee-generating cases testified that "[m]y office bills at between $30 and $40 an hour, which is far below the market rate in the District of Columbia." *Id.* at 140 (testimony of Bruce J. Terris). And another witness associated with a non-profit legal organization remarked: "I do not think I have seen anyone writing in this area who contemplates the situation in which Covington & Burling simply sends its bill to the losing party in a case in which its client won. I think the judge would have to retain some discretion to determine the degree to which the fees were reasonable." *Id.* at 227 (testimony of Philip J. Mause). Mr. Mause recognized that private agreements as to a suitable rate of compensation would not be controlling, adding: "[p]resumably the winning party might, under a contract with his own attorney, pay money in addition to that which was awarded from the loser." *Ibid.*

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70 n.9. But nothing in the House Report suggests that a court computing the amount of such an award must be oblivious to the windfall that results when a fee award is based on market rates well in excess of the organization's costs. *Incarcerated Men of Allen County Jail* v. *Fair*, 507 F.2d 281 (6th Cir. 1974), and *Torres* v. *Sachs*, 69 F.R.D. 343 (S.D. N.Y. 1975), aff'd, 538 F.2d 10 (2d Cir. 1976), cited in the House Report for the proposition that fees should not be denied to parties with organizational counsel, do not address the *measure* of fees for such parties. To be sure, *Fairley* v. *Patterson*, 493 F.2d 598 (5th Cir. 1974), which was cited for the same proposition, and the court of appeals' decision in *Torres*, do go further, holding that the amount of the fees should not be reduced. But neither case reflects consideration of the windfall potential inherent in the uncritical award of fees at market rates.

This testimony undercuts any suggestion that Congress mandated an inflexible market rate approach to computing attorney's fees that must be applied to a non-profit organization without regard to its costs. And when the costs of such an organization diverge significantly from the prevailing market rate for private legal services, as there is ample reason to believe they frequently do, only a cost-based approach to fee awards can assure that the award made is "fully compensatory" (*Hensley* v. *Eckerhart*, *supra*, slip op. 11) without conferring a windfall or subsidy upon the plaintiff's counsel.

3. In *Johnson* v. *Georgia Highway Express, Inc.*, *supra*, 488 F.2d at 719, the Fifth Circuit warned against the corrosive effects of excessive attorney's fees awards in terms that bear repetition:

> [C]ourts must remember that they do not have a mandate under [a fee-shifting statute] to make the prevailing counsel rich. Concomitantly, the [statute] should not be implemented in a manner to make the private attorney general's position so lucrative as to ridicule the public attorney general. The statute was not passed for the benefit of attorneys * * *.

To appreciate the significance of this reminder, it should be noted that, at the time the legal services in this case were rendered, the average cost to the taxpayer of United States Department of Justice legal services (including attorneys' salaries, support staff salaries, and other overhead) ranged from $27.48 per hour for a newly hired attorney without experience to $48.28 per hour for the most senior litigating personnel. See *Copeland* v. *Marshall*, *supra*, 641 F.2d at 912 n.10 (Wilkey, J., dissenting). The disparity between these cost levels and the market rates awarded by the district court to relatively junior legal services attorneys—that is, the disparity between the compensation awarded the public and private attorneys general—suggests that the courts below failed to fulfill their obligation to limit fees to the level needed to attract competent counsel and to avoid windfalls to attorneys.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AUGUST 1983

Docket Sheet

NO. 81-1374-CFX	TITLE	Barbara BLUM, individually and in her capacity as Commissioner of New York State Department of Social Services, Petitioner v. Ellen Stenson, etc.

DOCKETED	COURT
January 15, 1982	United States Court of Appeals for the Second Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioner: George D. Zuckerman
	Counsel for Respondent: John Kirklin
January 15, 1982	Petition for writ of certiorari filed. (Record filed).
FEb. 23, 1982	Brief, amici curiae, of the States of Washington, Alabama, et al., in support of petition filed.
Feb. 24, 1982	DISTRIBUTED. 3-19.
Mar. 1, 1982	Motion of respondent for leave to proceed in forma pauperis and brief in opposition filed.
Mar. 3, 1982	DISTRIBUTED. 3-19. (Motion for leave to proceed in forma pauperis).
Mar. 22, 1982	The motion of respondent Ellen Stenson for leave to proceed in forma pauperis is GRANTED.
May 23, 1983	DISTRIBUTED. 5-26.
May 31, 1983	The petition for writ of certiorari is GRANTED.

Aug. 17, 1983	Brief, amicus curiae, of the Commonwealth of Massachusetts in support of petitioner filed.
Aug. 15, 1983	Brief for the petitioner filed.
Aug. 15, 1983	Joint appendix filed.
Aug. 15, 1983	Brief, amicus curiae, for the U. S. filed.
Aug. 15, 1983	Brief, amici curiae, for Alabama, et al. filed.
Aug. 23, 1983	Order extending time to file the respondent's brief on the merits until Oct. 14, 1983.
Oct. 7, 1983	Order further extending time to file the respondent's brief on the merits until Oct. 24, 1983.
Oct. 24, 1983	Brief, amici curaie, of NAACP Legal Defense and Educational Fund, Inc., et al. filed.
Oct. 24, 1983	Brief, amici curiae, of Oliver Hill, Daniel B. Elderman, et al. filed.
Oct. 24, 1983	Brief, amici curiae, of National Education Association, et al. filed.
Oct. 24, 1983	Brief, amicus curiae, of The Alliance for Justice filed.
Oct. 24, 1983	Brief, amicus curiae, of California Coalition of Welfare Rights Organizations filed.
Oct. 24, 1983	Brief, amici curiae, of The New York State Bar Association, et al. filed.

(Over)

81-1374

Title

No.

DATE	PROCEEDINGS AND ORDERS
Oct. 24, 1983	Brief for the respondents filed.
Nov. 15, 1983	CIRCULATED.
an. 4, 1984	Reply brief for the petitioner filed.
an. 11, 1984	ARGUED.